In the Supreme Court
OF THE
United States

OCTOBER TERM, 1966

No. 103

JOE NATHAN COOPER,
Petitioner,
vs.
THE PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

On Writ of Certiorari to the Supreme Court of the State of California

BRIEF FOR THE RESPONDENT

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OPINION BELOW

The opinion of the California District Court of Appeal for the First Appellate District and the order of the Supreme Court of California denying a hearing are reported in 234 Cal.App.2d 587, 44 Cal. Rptr. 483 (R. 257-276).

JURISDICTION

Jurisdiction is conferred on this Court by Title 28, United States Code, section 1257(3).

The judgment of the District Court of Appeal was entered on May 24, 1965. The Supreme Court of California denied a hearing by an order entered on July 21, 1965.

A timely petition for writ of certiorari was filed in this Court. The petition for certiorari was granted on April 18, 1966, in 700 Misc. O.T. 1965, 384 U.S. 904.

STATUTES INVOLVED

Relevant statutes and constitutional amendments, federal and state, are set forth in the Appendix.

QUESTIONS PRESENTED

1. Can a state court apply the harmless error rule to a conviction involving the use of illegally obtained evidence, and, if so, was the error here harmless?
2. Was the search of the vehicle several days after the arrest without a warrant but while the vehicle was in the custody of the state, having been lawfully seized pursuant to the state narcotic laws, reasonable under the Fourth Amendment?
3. Was petitioner denied the right of confrontation under the Constitution of the United States because the prosecution did not call the informant

as a witness, although his identity was disclosed and he was made available to the defense, and has this question been raised and pursued through the state courts so as to permit review by this Court?

STATEMENT

Petitioner was indicted and convicted of selling heroin on December 21, 1961, and of committing an assault on that date. The convictions were affirmed by the District Court of Appeal. At trial, Cooper admitted two prior felony convictions, for drunk driving (R. 242), and for selling marijuana (R. 240).

On December 21, 1961, at about 6:00 a.m., Frank Green was arrested in Richmond, California, by state narcotic agents and a municipal police officer for selling heroin (R. 45). Green was interrogated at the Richmond Police Department (R. 46). He agreed to act as an informant. Green's person and clothing were thoroughly searched at the time of his arrest (R. 45, 77) and again at the police station at about noon of the same day (R. 46, 58).

After completion of the second search, Green was furnished with twenty dollars in marked money (R. 46). State narcotic agent Armenta and federal narcotic agent Lee then took Green to a public telephone booth in downtown Richmond (R. 47). Shortly after 12:30 p.m. (R. 46), Green and Armenta entered the telephone booth together. Armenta attached a twin phone listening device to the telephone receiver (R.

47). Green dialed the number of petitioner Joe Cooper's residence (R. 73). A woman answered and Green asked for "Joe." "Joe" was called to the phone. Green asked, "How about a deuce?" "Joe" said "Yes." At Green's suggestion the two agreed to meet right away at Newell's Market (R. 49). Agent Armenta recognized "Joe's" voice as that of petitioner Joe Cooper (R. 49). Armenta testified that "deuce," in the narcotic trade, refers to bindles or capsules of heroin (R. 50).

On this date petitioner resided at 536 South 20th Street in Richmond (R. 104). Richmond vice squad officer Stumpf, who had participated in the early morning arrest of Green, and state narcotic agent Yates had petitioner's residence under surveillance while the recited telephone conversation was occurring (R. 177-178). Stumpf and Yates watched from a car located on 19th Street, immediately north of Cutting Boulevard. Both could observe petitioner's house on 20th Street across the intervening vacant corners (R. 177). At about 12:50 p.m. Stumpf saw a person that fit Cooper's description emerge from petitioner's house, walk to the 1957 blue Oldsmobile parked in the front, do something with the car trunk for two or three minutes, then drive north to Cutting, east to 22nd Street and then South on 22nd Street (R. 180).

Newell's Market was located on the southwest corner of 23rd and Cutting (R. 50). Adjacent to the market on the west side, extending westerly along Cutting to 22nd Street, was a large parking lot (R. 51). After Green completed his telephone call, he was

driven by Armenta and Lee to 23rd and Virginia Streets, one block north of the market (R. 50). Green got out of the car there. Armenta left the vehicle a short distance away (R. 51). Both proceeded to the front of Newell's Market. Green approached it on the west side of 23rd Street and Armenta on the east side, crossing Cutting and 23rd Street to the front of the market (R. 52). All during this time Armenta saw that Green contacted no one (R. 52).

Agent Armenta watched Green walk into the parking lot (R. 52). Armenta next observed Cooper, whom he identified, drive into the parking lot from 23rd and Cutting, alone in a 1957 blue Oldsmobile (R. 53). After losing sight of Green for two or three minutes, Armenta saw him leave the lot and return to the vicinity of 23rd and Virginia, where Agent Lee waited (R. 54). Armenta stated that Green was in the parking lot some five minutes altogether, and after Cooper's car entered the lot it was "Just a couple of minutes, one or two," until Green emerged (R. 64).

Standing in front of the market, Armenta observed state narcotic agent Groom, who had taken a position with Richmond Police Lieutenant Sullivan in a service station on the northeast corner of 23rd and Cutting, diagonally across from Newell's Market (R. 54). Armenta watched Groom leave the service station, cross 23rd Street, and proceed to the north side of Cutting to a position which offered a vantage point on the parking lot (R. 54).

Groom and Sullivan observed Green and Armenta in the telephone booth and accompanied them to the

market in a separate vehicle (R. 78-79). Parked in the service station, they saw Armenta and Green approach the market (R. 80). Groom then left the service station, and proceeded to the porch of a house fronting on 23rd Street. From this location Groom enjoyed a clear view of the front of the market and of the easterly half of the parking lot (R. 82, 121). He testified that he could see Armenta and Green and continued to watch Green (R. 83). Shortly, Green walked out into the parking lot from a position close to the wall of the building (R. 84). At this point, Groom left the porch and moved to a new vantage point alongside the house. From there he could view the entire parking lot (R. 84). He subsequently observed Green approach "the Oldsmobile, which I recognized as the car that Joe Cooper usually drove, and talk to a man in that car who appeared to me to be Joe Cooper." (R. 84). Green stood by the driver's side of the car for a minute or more and then walked out of the lot up 23rd Street to Virginia (R. 84). Groom continued to watch Green until the informant came into Agent Lee's view (R. 84).

Officer Stumpf and Agent Yates saw Cooper depart from his house in a 1957 Oldsmobile (R. 180, 188). Yates radioed this information to Lieutenant Sullivan, who remained parked in the service station (R. 180). After receiving this message, Sullivan saw Cooper's Oldsmobile, which he recognized, enter the parking lot. Green approached the car, sat in the front seat with Cooper for a few minutes, then got out and walked back toward 23rd Street (R. 140). Sullivan testified that the only person in the Oldsmo-

bile when it entered the lot "appeared to me to be Joe Cooper" (R. 140). He had seen Cooper in a car about two weeks earlier (R. 140). Sullivan indicated that, save for momentary interruptions by passing cars, he had Green under constant surveillance while Green was in the parking lot (R. 150).

Agent Yates and Officer Stumpf drove to the market area. Yates saw in the Newell parking lot Green leaving the same car and driver which he saw depart from Cooper's residence (R. 189).

Green returned to Agent Lee's automobile and handed Lee, in Agent Armenta's presence, a small brown packet (R. 157). The three men thereupon returned to the Richmond Police Department, (R. 55, 158). This package consisted of two white paper bindles of heroin wrapped in brown wrapping paper of the variety used in grocery bags (R. 157). A field test of the contents of the package indicated a possible opium derivative (R. 161-162).

Groom and Sullivan followed Cooper as he left the parking lot, but lost him on 26th Street (R. 85). They then returned to the Richmond Police Department (R. 158). Cooper thus had considerable opportunity to dispose of the marked bills. The authorities next attempted to find Cooper's car. His Oldsmobile was located at 7th and Macdonald in Richmond at 2:15 p.m. on December 21. It was kept under surveillance until about 3:45 p.m. when Cooper walked toward the car with a woman and two children (R. 159). Groom and Yates arrested Cooper as the petitioner started to unlock his car. Groom took Cooper's

right wrist, and Cooper said, "It's there in the car over the sun visor" (R. 89). Asked what was there, Cooper responded, "The marijuana cigarettes. But I didn't put them there, someone else put them there." (R. 89).

Cooper then put his left hand into his right shirt pocket, removed an object wrapped in brown paper, and began to place it in his mouth (R. 89-90). Agent Groom thought the object was a package of heroin (R. 117). Groom and Yates grabbed Cooper's left arm; Groom grabbed Cooper's hand. Cooper put both the package and Groom's hand into his mouth, and stubbornly chewed both (R. 90). Shouting in pain to Cooper to release his finger (R. 182), Groom took hold of Cooper's nose (R. 97), and after a scuffle, managed to extract his severely lacerated finger (R. 90) from Cooper's month (R. 199). Cooper apparently succeeded in swallowing the package (R. 90). Cooper was subdued and taken as a state prisoner to the police station (R. 199).

Cooper's Oldsmobile was seized and impounded pursuant to California Health and Safety Code section 11611. The automobile, Cooper, and his female companion were searched. However, the marked money furnished Green was not found (R. 106-107).

About one week after Cooper's arrest, Agent Groom made a cursory search (R. 103) of petitioner's Oldsmobile at the Beacon Tow Service in Richmond. He found in the glove compartment a three inch by five inch (R. 131) piece of brown paper. It appeared to have been torn from an ordinary grocery bag (R.

170). This piece of paper, together with two bindles of heroin and a smaller piece of brown paper in which the bindles came wrapped, formed People's Exhibit Four. No mention of the paper removed from Cooper's car was made during direct examination of Groom. It was first brought up during Groom's cross-examination (R. 114). On redirect, the prosecution elicited from Groom the circumstances of its seizure (R. 130). Over petitioner's objection that a proper chain of custody had not been established, this piece of paper was admitted in evidence as part of Exhibit Four (R. 171).

Cooper was charged by indictment with selling heroin and with assault by means of force likely to produce great bodily injury (R. 23). An amended indictment filed at trial charged the same offenses and in addition charged two prior convictions of felonies (R. 28). Petitioner admitted the priors (R. 242) and pleaded not guilty to the charges of assault and sale of heroin (R. 27). Petitioner waived jury trial (R. 43).

On April 4, 1962, Groom made another search of Cooper's impounded automobile. He discovered a single marijuana seed in the interior of the vehicle When the prosecuting attorney offered this seed in evidence, the trial court inquired, "Might I ask the relevancy of this . . . ? It's outside of the issues." (R. 101). However, the seed itself was received in evidence without objection. The trial court then denied a motion to strike Groom's testimony pertaining to the finding of the seed, remarking, "As I say, very

frankly, I don't think it has any great weight." (R. 102).

Cooper was the sole defense witness. He denied the sale and denied meeting Green at Newell's Market on December 21 (R. 211-212). He also denied agreeing to meet with Green at the market on that date (R. 222). Cooper stated that he was not at home when the telephone call in question was made (R. 212). Petitioner, previously convicted for a sale of marijuana (R. 242), testified that the narcotic term "deuce" was meaningless to him (R. 222-223). Cooper did not recall biting Groom's finger (R. 215-216).

Informant Green, who was made available to the defense (R. 208), did not testify. Cooper claimed that about two weeks prior to his arrest he and Green fought over a gambling debt (R. 210).

After the People had rested their case, petitioner moved for dismissal. Denying the motion, the trial judge declared: "I see no reason . . . to disbelieve at this point the basic testimony of the officers. I have no doubt that the defendant was out there. I have no doubt that Green was out there. I have no doubt that the contact was made. The two bindles are here." (R. 208).

The trial court subsequently found Cooper guilty of selling heroin. In summarizing the evidence against petitioner, the court made no reference to the piece of brown paper which Agent Groom removed from Cooper's car after it had been impounded (R. 242). Cooper was also found guilty of simple assault (R. 245). He was sentenced to be imprisoned for the term

prescribed by law for the narcotics offense (R. 250). He was sentenced to six months in the County Jail for the assault, the sentences to run concurrently (R. 252).

The conviction was affirmed by the California District Court of Appeal. The District Court found Groom's search of the automobile to be illegal (R. 267) and the evidence thereby obtained—the scrap of brown paper—to be inadmissible. After reviewing the remaining evidence (R. 270), the appellate court concluded that the resultant error was harmless, whether judged by the standard announced in *People v. Watson*, 46 Cal.2d 818, 299 P.2d 243 (1956), or by that articulated in *Fahy v. Connecticut*, 375 U.S. 85, 86-87 (1963) (R. 270).

Cooper petitioned for a hearing in the Supreme Court of California. Here, for the first time, he raised the issue of an unconstitutional denial of his right of confrontation and cross-examination. The petition was denied (R. 276).

SUMMARY OF ARGUMENT

The judgment should be affirmed since any error in receiving illegally seized evidence was harmless. Since the prejudicial effect of erroneously admitted evidence turns not on the manner of obtaining the evidence but on the nature of such evidence and since the use of illegally seized evidence does not result in the denial of a fair trial, there is no necessity to apply a rule requiring reversal in all cases regardless

of the nature of the evidence. The creation of a reversible per se rule in illegally obtained evidence cases would be contrary to all state and most federal decisions on the question, and it would strike down, at least in part, the harmless error rule of every state, as well as that enacted by Congress. Moreover, the creation of a reversible per se rule would not have a deterrent effect on any illegal police practices, nor should such a rule be based on the unwarranted assumption that state and federal appellate courts will rely on the harmless error rule to circumvent rights guaranteed by the United States Constitution.

Since a standard of harmless error may be applied to illegally seized evidence cases, the California standard of harmless error may properly be applied. The California standard is valid under the Fourteenth Amendment since it adequately protects federal constitutional rights. Since the California rule is valid, the reliance by the state appellate court upon that rule constitutes an independent and adequate state ground of decision. Moreover, such a ground for decision should be respected in federal habeas corpus proceedings.

No matter what standard of harmless error is applied in this case, it is manifest that the brown scrap of paper received in evidence did not prejudice the petitioner so as to require a reversal.

Secondly, the necessity for the state appellate court to consider and apply the state harmless error rule turned on the determination by that court that the brown scrap of paper had been secured in a search

and seizure that was unreasonable under the Fourth Amendment to the United States Constitution. We submit that the state court erred in this conclusion. The search of a vehicle which is lawfully in the custody of the law enforcement officials from the time of seizure is not an unreasonable search. The reasonableness of the search is even more clear when the vehicle is lawfully seized and impounded pursuant to a valid narcotic forfeiture law.

Finally, the claim that petitioner was denied his right of confrontation under the Sixth Amendment is without substance. The claim was never presented to the state intermediate appellate court, which is the highest court of the state for the purposes of this proceeding. Nor is there any adequate excuse for this failure. On the merits, petitioner has no valid claim. No hearsay evidence of any consequence was used against him. The informant, whose conduct as testified to by the investigating officers is the basis for the claim here, was identified to the petitioner and made available at the trial for such action as he deemed proper. There was no duty on the prosecution to call the informant as a witness since all material facts were developed through other witnesses.

ARGUMENT

I

THE STATE APPELLATE COURT PROPERLY HELD THAT WHILE SOME EVIDENCE THAT WAS THE PRODUCT OF AN ILLEGAL SEARCH AND SEIZURE WAS ERRONEOUSLY RECEIVED IN EVIDENCE THE ERROR WAS HARMLESS.

The Fourteenth Amendment to the United States Constitution does not require that state appellate courts apply a prejudicial error per se rule to criminal convictions in which evidence has been received which is the product of an unreasonable search and seizure. The state appellate courts are free to measure the question of prejudice by the state rule governing appellate review so long as that state standard is itself valid under the federal Constitution. Finally, no matter what standard of appellate review is applied to the case at bar, there was no prejudice to petitioner and the judgment should be affirmed.

A. The Fourteenth Amendment to the United States Constitution Does Not Require That a Prejudicial Error Per Se Rule Be Applied to Every Case in Which Evidence Is Received Which Is the Product of an Unlawful Search and Seizure.

The decisions of this Court have not required that the state or federal appellate courts apply a prejudicial error per se rule to criminal convictions where evidence may have been received which was the product of an unreasonable search and seizure.

The Court has not accepted the doctrine urged by the petitioner, to wit, that every constitutional error must result in a reversal. Instead, the Court has appraised the effect of the error when the error involved

the reception of evidence, such as in the coerced confession cases, and required a reversal, not because of the nature of the error, but because of the effect upon the jury or the trier of fact of the particular error. Where the constitutional error has related to procedural due process and impaired the reliability of the fact finding process, the Court has insisted upon reversal.

The reception of evidence which is the product of an unlawful search and seizure, however, does not necessarily have the prejudicial effect of a coerced confession, nor does it impair the reliability of the fact finding process, and result in a denial of due process of law.

The state appellate courts are unanimous and the federal appellate courts nearly so in recognizing that the Constitution does not require them to apply a prejudicial error per se rule to a criminal conviction because of the reception of illegally obtained evidence when that evidence is not prejudicial to the defendant.

Should this Court depart from its own precedents and the view of the state and federal appellate courts and require that a prejudicial error per se rule be applied in such cases, the Court would in effect hold the federal harmless error rule, as adopted by Congress, unconstitutional and the harmless error rule of all of the states, most of which have been adopted by the people or by legislative action, unconstitutional. This mass undoing of the will of Congress, the will of the state legislatures, the will of the state appellate judges, and indeed the will of the people, would reject

the hard learned teachings of history and would accomplish no useful purpose.

A prejudicial error per se rule would not deter violations of the Fourth Amendment in connection with illegal search and seizure cases. And to the extent that a prejudicial error per se rule might be based upon the fear that state appellate judges and federal appellate judges would rely on the harmless error rule to circumvent the protection of the United States Constitution, we submit that this fear is false, wholly unwarranted, and a reflection upon the integrity of the system for the administration of justice throughout the United States.

1. The Decisions of This Court Do Not Require That Any Prejudicial Error Per Se Rule Be Applied by State and Federal Appellate Courts to the Reception of Illegally Obtained Evidence When That Evidence Is Not Prejudicial.

After arguing that the evidence in question here constituted reversible error under the test announced in *Fahy v. Connecticut, supra*, petitioner argues that, regardless of prejudice, this Court should apply what he calls "the accepted rule" that unconstitutional error requires a reversal, regardless of the nature of the error, regardless of the effect of the error in the particular case, and regardless of its effect on the reliability of the fact finding process (Brief for the Petitioner 24). Such a rule, in requiring a reversal in every case in which evidence was erroneously received when that evidence was the product of an unreasonable search and seizure, would strike down a vital segment of the settled constitutional and statutory law of the United States and the fifty states. This

doctrine, if accepted, would impose a great threat to the administration of justice in the United States.

We find no such "accepted rule" in the decisions of this Court. On the contrary, we find in the thread of the decisions a willingness to accept reality, to appraise the effect of erroneously received evidence, to appraise the effect of a rule of procedure, and a willingness to permit appellate judges to act as judges and not automatons.

a. Fahy v. Connecticut did not apply the prejudicial error per se rule to the reception of illegally obtained evidence.

In *Fahy v. Connecticut, supra,* 375 U.S. 85 (1963) the majority of this Court, in an opinion by Mr. Chief Justice Warren, left the specific question open:

> "On the facts of this case, it is not now necessary for us to decide whether the erroneous admission of evidence obtained by an illegal search and seizure can ever be subject to the normal rules of 'harmless error' under the federal standard of what constitutes harmless error. Compare *Ker v. California,* 374 U.S. 23." *Id.* at 86.

However, the Court went on to decide that the evidence was in fact prejudicial. Therefore, the error was not harmless and the conviction was reversed.

The question of harmless or reversible error was framed as follows:

> "The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction. To decide this question, it is necessary to review the facts of the case and the evidence adduced at trial." *Id.* at 86-87.

The majority of the Court then proceeded in effect to apply a harmless error standard to the facts of the case. It is not material at this juncture whether the rule as stated is substantially the same as, or different from, the California harmless error rule. The point is that the Court clearly refused to hold that the mere admission of the evidence in itself required a reversal. Instead, the Court stated the rule of appellate review that it would apply and then it proceeded to do what every state and federal appellate court does when confronted with this same question, that is, review the facts of the case and the evidence adduced at trial and determine whether the error is prejudicial or harmless.

The petitioner and his co-defendant were convicted of having painted swastikas on a synagogue. The majority of the Court identified the evidence which was erroneously admitted—a can of black paint and a paint brush found in Fahy's car—and examined its effect upon the other evidence and the conduct of the defense.

> "Examining the effect of this evidence upon the other evidence adduced at trial and upon the conduct of the defense, we find inescapable the conclusion that the trial court's error was prejudicial and cannot be called harmless." *Id.* at 87.

The majority of the Court considered the effect of the inadmissible evidence itself:

> "Obviously, the tangible evidence of the paint and brush was itself incriminating. In addition, it was used to corroborate the testimony of Officer Lindwall as to the presence of petitioner near the

scene of the crime at about the time it was committed and as to the presence of a can of paint and a brush at petitioner's car at that time." *Id.* at 88.

The majority of the Court examined in detail the findings of the trial judge. He had found that the police found the same can of black paint and the brush in the car which the defendants had been operating when stopped by the officer earlier in the morning. The Court evaluated the effect of the inadmissible evidence upon the otherwise admissible evidence, that is, the officer's testimony as to the stopping of the car and what he had observed at that time.

> "It can be inferred from this that the admission of the illegally seized evidence made Lindwall's testimony far more damaging than it would otherwise have been." *Id.* at 88-89.

The majority of the Court noted other effects of the inadmissible evidence. It had been used as the basis of opinion testimony to the effect that the paint and brush matched the markings on the synagogue. Thus, ". . . forging another link between the accused and the crime charged." *Id.* at 89. After noting that the trial court had made a specific finding that the paint brush which was illegally obtained matched the markings made with black paint on the synagogue, the Court observed:

> "In relation to this testimony, the prejudicial effect of admitting the illegally obtained evidence is obvious." *Ibid.*

Moreover, admissions by Fahy were used against him at trial. After examining the evidence and the

manner of securing the admissions, the Court considered the effect of the illegally obtained evidence upon those admissions and concluded:

> "Thus petitioner should have had a chance to show his admissions were induced by being confronted with the illegally seized evidence." *Id.* at 91.

Finally, another "indication of the prejudicial effect of the erroneously admitted evidence," *ibid.*, was pointed to. The majority of the Court observed that it was only after admission of the paint and brush and the use of this evidence to corroborate the other evidence and after introduction of the confession, that the defendants took the stand and admitted their conduct and tried as a matter of defense to establish that the nature of those acts was not within the scope of the felony statute under which they had been charged.

It cannot be disputed that the majority of the Court did in effect apply a harmless error rule in *Fahy*. It applied that rule in the same manner that the state and federal appellate courts apply their own harmless error rules, that is, by a painstaking and careful analysis of the record and the effect of the erroneously admitted evidence upon the proceedings of the trial.

The majority of the Court does expressly reject any harmless error test founded simply on the question of independently sufficient evidence:

> "We are not concerned here with whether there was sufficient evidence on which the petitioner could have been convicted without the evidence complained of." *Id.* at 86.

Of course, no such rule is applied in California and it seems reasonably well settled that any such rule would be an inadequate standard of appellate review.

Four justices of this Court dissented from the majority opinion. The dissenting opinion was authored by Mr. Justice Harlan. This opinion does not suggest that any automatic reversal rule be applied. On the contrary, the opinion of Mr. Justice Harlan expressly decides the question left open by the majority opinion:

> "This brings me to the question which the Court does not reach: Was it constitutionally permissible for Connecticut to apply its harmless-error rule to save this conviction from the otherwise vitiating effect of the admission of the unconstitutionally seized evidence? I see no reason why not." *Id.* at 94.

Mr. Justice Harlan did not deem it necessary to determine whether a state or federal standard of harmless error should govern since the Connecticut standard applied was as strict as any possible federal standard. *Id.* at 95, n. 2.

b. Stoner v. California did not apply the prejudicial per se rule.

In *Stoner v. California,* 376 U.S. 483 (1964), the Court held that the illegally obtained evidence was prejudicial.

> "But the conviction depended in large part upon the jury's resolution of the question of the credibility of witnesses, and that determination must almost certainly have been influenced by the incriminating nature of the physical evidence il-

legally seized and erroneously admitted." 376 U.S. at 490 n. 8.

Justice Harlan dissented from the disposition of the case, stating that he would remand the case to the California District Court of Appeal so that it might consider whether or not admission of the illegally seized evidence was harmless error. *Id.* at 490-491.

Thus in *Stoner,* as in *Fahy,* the majority of this Court refused to apply the prejudicial error per se rule to the question of whether a criminal judgment should be reversed, illegally seized evidence having been received at trial.

c. This Court has applied the harmless error rule to violations of constitutional rights which did not prejudice the defendant.

In applying a rule of appellate review which requires a showing of prejudice for reversal and in appraising the effect of the inadmissible evidence upon the entire course of the proceedings at trial, the Court in *Fahy v. Connecticut* was only carrying out the principles announced and applied in many prior decisions of this Court.[1]

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[1]Petitioner cites *Kremen v. United States,* 353 U.S. 346 (1957), for the proposition that: "Even before *Mapp v. Ohio, supra,* the admission of illegal evidence of arguably negligible value required a reversal." Brief for the Petitioner 31. *Kremen,* however, lends no support to this proposition. The opinion of the Court discusses only the question of whether the search and seizure which produced the evidence complained of was unreasonable. The dissenting opinion states that the harmless error rule should be applied. Neither opinion, however, discusses the possible effect of the illegally seized evidence in the light of the other evidence admitted, and it therefore cannot be determined whether there was any basis for saying that the error in admitting the evidence was harmless.

In *Motes v. United States*, 178 U.S. 458 (1900), this Court unanimously applied the harmless error rule to a federal criminal judgment in which evidence had been received in violation of the defendant's rights under the Sixth Amendment to the United States Constitution. Several defendants were tried for conspiracy to violate federal civil rights. Taylor, one of the defendants, confessed and testified to the killing at the preliminary hearing. Federal officials negligently allowed him to escape before trial. At the trial, his testimony was read into the record. Motes testified that he and Taylor had done the killing. All defendants were convicted and appealed. The judgment was reversed as to the other defendants but affirmed as to Motes.

This Court held that the use of Taylor's statements violated the Sixth Amendment rights of all the defendants, but did not prejudice Motes because of his judicial confession, which was regarded as conclusive evidence of guilt.

> "We can therefore say, upon the record before us, that the evidence furnished by Taylor's statement was not so materially to the prejudice of Columbus W. Motes as to justify a reversal of the judgment as to him. It would be trifling with the administration of the criminal law to award him a new trial because of a particular error committed by the trial court, when in effect he has stated under oath that he was guilty of the charge preferred against him." *Id.* at 476.

A similar rule was applied by this Court in reviewing a state conviction in which there was a violation

of the defendant's right to be present during the proceedings, a right at that time deemed analogous to the rights conferred by the Sixth Amendment. Even though the defendant was not permitted to be present at a viewing of the scene of the offense by the jury, although his attorney was present, this Court affirmed a murder conviction with a death sentence on the ground that no prejudice was shown. *Snyder v. Massachusetts,* 291 U.S. 97 (1934).

Similarly, violations of the defendant's privilege under the Fifth Amendment, as implemented by federal statute, have been held not to constitute reversible error per se, but to be subject to the waiver doctrine (*Johnson v. United States,* 318 U.S. 189 [1943]) and to be subject to a form of the harmless error rule. *Wilson v. United States,* 149 U.S. 60 (1893). See also *Cloud v. United States,* 361 F.2d 627 (8th Cir. 1966); *United States v. Knox Coal Co.,* 347 F.2d 33 (3rd Cir. 1965); *Coleman v. Denno,* 223 F. Supp. 938 (S.D.N.Y. 1963), *aff'd sub nom. United States v. Denno,* 330 F.2d 441 (2d Cir. 1964).

d. The rule of reversal in involuntary confession cases does not require reversal in illegally seized evidence cases.

There is nothing inconsistent between the application of the harmless error rule in search and seizure cases—as in *Fahy* and *Stoner*—and the generally accepted rule that the use of an involuntary confession requires reversal regardless of other evidence of guilt.

Bear in mind that the so-called "harmless error rule" is only part of a rule. It is one aspect of the

rule of appellate review generally accepted throughout the United States which provides a test in general terms of prejudice for determining whether an error calls for reversal or affirmance. Sometimes the rule calls for reversal; sometimes it calls for affirmance. But in arriving at this result, the rule takes as controlling the effect of any inadmissible evidence. Consequently, the California harmless error rule recognizes that the use of an involuntary confession requires reversal regardless of other evidence of guilt and that appellate courts cannot inquire into the prejudicial nature of it. *People v. Dorado*, 62 Cal.2d 338, 398 P.2d 361, *cert. denied*, 381 U.S. 937, 946 (1965); *People v. Matteson*, 61 Cal.2d 466, 393 P.2d 161 (1964).

Thus California applies as an integral part of its rule of appellate review the doctrine announced in many cases by this Court that the reception into evidence of an involuntary confession requires reversal, without regard for the truth or falsity of the confession and even though there is ample evidence aside from the confession to support the conviction. *Jackson v. Denno*, 378 U.S. 368, 376 (1964); *Haynes v. Washington*, 373 U.S. 503, 518-519 (1963); *Lynumn v. Illinois*, 372 U.S. 528 (1963); *Rogers v. Richmond*, 365 U.S. 534 (1961); *Stroble v. California*, 343 U.S. 181, 190 (1952); *Malinski v. New York*, 324 U.S. 401, 404 (1945); *Lyons v. Oklahoma*, 322 U.S. 596, 597, n. 1 (1944).

We think that the reason for the rule of prejudicial error per se in regard to involuntary confessions has

been expressed very well by Chief Justice Traynor of the California Supreme Court:

> "Almost invariably, however, a confession will constitute persuasive evidence of guilt, and it is therefore usually extremely difficult to determine what part it played in securing the conviction. (See *Payne v. Arkansas,* 356 U.S. 560, 568 [78 S.Ct. 844, 2 L.Ed.2d 975, 981]; Allen, *Federalism and the Fourth Amendment: A Requiem for Wolf,* 1961 Sup.Ct.Rev. 1, 45; cf. *Hamilton v. Alabama,* 368 U.S. 52, 55 [82 S.Ct. 157, 7 L.Ed.2d 114, 116-117].) These considerations justify treating involuntary confessions as a class by themselves and refusing to inquire whether in rare cases their admission in evidence had no bearing on the result." *People v. Parham,* 60 Cal.2d 378, 385, 384 P.2d 1001, 1005 (1963), *cert. denied,* 377 U.S. 945 (1964).

This view, which predicates the rule on the inherently prejudicial effect of a confession during a trial, finds express support in *Payne v. Arkansas,* 356 U.S. 560, 568 (1958):

> "[W]here, as here, a coerced confession constitutes a part of the evidence before the jury and a general verdict is returned, no one can say what credit and weight the jury gave to the confession." See also *Stroble v. California,* 343 U.S. 181, 190 (1952).

Mr. Justice Harlan has expressed the same view:

> "Cases in which this Court has held that the sufficiency of other evidence will not validate a conviction if an unconstitutionally obtained confession is introduced at trial, *e.g., Malinski v.*

New York, 324 U.S. 401, are inapposite. It may well be that a confession is never to be considered as nonprejudicial." *Fahy v. Connecticut*, *supra*, 375 U.S. at 95 (dissenting opinion).

Petitioner attempts to meet this analysis of the coerced confession cases by bluntly asserting that the coerced confession cases are not in a class by themselves. He points to other situations in which the United States Supreme Court has reversed involving constitutional or statutory questions.[2] He also suggests

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[2]Several cases cited by petitioner lend no support to the proposition that reversal is required in every case of conviction wherein a procedural right guaranteed by the Constitution has been denied.

The quotation from *Miranda v. Arizona*, 384 U.S. 436, 468 (1966), to the effect that: "The Court 'will not pause to inquire in individual cases whether the defendant was aware of his rights without a warning being given,'" Brief for the Petitioner, 27, has nothing to do with harmless error, but merely lays down a conclusive presumption that a person under interrogation is unaware of his rights to counsel and to remain silent unless he has been advised of them by the police.

In *Williams v. North Carolina*, 317 U.S. 287, 292 (1942) and *Stromberg v. California*, 283 U.S. 359, 368 (1931), the juries were instructed that convictions could be predicated on the finding of any one of several alternative sets of facts. In each case, one set of facts did not amount to a crime of which petitioners could constitutionally be convicted. The convictions were reversed, even though there was in each case evidence from which the jury could find facts on which a valid conviction could be based, since it could not be said that the jury actually found such facts. The giving of these instructions could thus not be deemed harmless error under any standard.

Bruno v. United States, 308 U.S. 287 (1939), is merely a construction of the federal harmless error rule in its application to a nonconstitutional error made in a federal trial.

United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 228 (1940) and *National Labor Relations Bd. v. Newport News Co.*, 308 U.S. 241, 248-49 (1939), have nothing to do with procedural rules. They deal with substantive law and merely hold that the Sherman Act and the National Labor Relations Act, respectively, are to be read literally.

that illegally seized evidence is "tantamount to coerced testimony," citing *Mapp v. Ohio,* 367 U.S. 643, 656 (1961), and he states that no rational basis exists for distinguishing unconstitutionally obtained real evidence from unconstitutionally obtained testimonial evidence, citing *Wong Sun v. United States,* 371 U.S. 471, 485-486 (1963). (Brief for the Petitioner 24-25).

These latter assertions raise very interesting questions upon which some constitutional questions may turn, but they have nothing to do with this case. The difference is not between illegally seized evidence and coerced testimony or real evidence and testimonial evidence, but between a confession, which is what it says it is, that is, an acknowledgment and admission of guilt, normally including an admission of all elements of the offense, and real or physical evidence which may or may not be prejudicial and constitute grounds for reversal. But the question turns not on the type of evidence or on the reason for its inadmissibility, but on the effect of the evidence, in light of the whole record, upon the trier of fact. The piece of grocery sack paper with which we are concerned in this case is no more like a confession than a cry of "help" is like a confession. Thus the rule requiring reversal in the case of an involuntary confession does not preordain the rule in cases involving an inadmissible utterance of an exculpatory or essentially meaningless character. Indeed the California Supreme Court has recognized this distinction, and while it reverses in the event of a confession, it has affirmed convictions where the inadmissible utterance was an

exculpatory statement or otherwise not prejudicial. See, *e.g.*, *People v. Hillery*, 62 Cal.2d 692, 401 P.2d 382 (1965); *People v. Robinson*, 62 Cal.2d 889, 402 P.2d 834 (1965); *People v. Nye*, 63 Cal.2d 166, 403 P.2d 736, *cert. denied*, 384 U.S. 1026 (1966).

e. The rule of reversal in cases where the denial of constitutional rights has resulted in denial of a fair trial does not require an absolute rule of reversal, since the use of illegally obtained evidence does not deny the defendant a fair trial.

In addition to the coerced confession cases, there have been numerous instances in which this Court has reversed a conviction by reason of the denial of various constitutional rights. The bulk of the cases relied on by the petitioner in this connection have one quality in common which gives to those cases a distinctive character. The common quality is that the error impaired the reliability of the guilt determining process. In essence, the defendant was denied a fair trial.

This is true of the denial of counsel at trial or of the denial of right to counsel at a critical stage in the proceedings. *Hamilton v. Alabama*, 368 U.S. 52 (1961); *White v. Maryland*, 373 U.S. 59 (1963). Trial by a judge, sitting as trier of fact, who has a pecuniary interest in finding an accused guilty, strikes at the very heart of the guilt-determining process. *Tumey v. Ohio*, 273 U.S. 510, 535 (1927). Where the community in which a trial is held has been saturated by prejudicial pretrial publicity concerning an accused's confession, there is no way to be sure that the jury which convicts the accused is uninfluenced by "evidence" not properly before it. *Rideau v. Louisiana*,

373 U.S. 723 (1963). An instruction in terms of a presumption violative of the Constitution because it does not logically arise from a given set of facts renders impossible a reliable determination of guilt. *Bollenbach v. United States,* 326 U.S. 607 (1946).[3] And, of course, there can be no greater threat to the reliability of the guilt determining process than the use of perjured testimony, as condemned by Judge Magruder in his concurring opinion in *Coggins v. O'Brien,* 188 F.2d 130, 139 (1st Cir. 1951). See also *Napue v. Illinois,* 360 U.S. 264 (1959).

But not all constitutional errors result in the denial of a fair trial. The distinction between the search and seizure exclusionary rule and those procedural defects which undermine the integrity of the fact-finding process has been specifically recognized by this Court in connection with the question of retrospective application, and we submit that the same principles may properly be considered in connection with the question of the application of the harmless error rule.

In *Linkletter v. Walker,* 381 U.S. 618 (1965), the Court specifically noted that one quality was common in regard to cases in which the court had applied a newly developed constitutional rule retrospectively:

> "Finally, in each of the three areas in which we have applied our rule retrospectively the principle that we applied went to the fairness of the

[3]The implication in *Bollenbach* that the giving of an unconstitutional instruction necessarily requires reversal is dictum, since it is clear from the facts of the case that the jury based its verdict on the instruction in question.

> trial—the very integrity of the fact-finding process." *Id.* at 639 (footnote omitted).

Here, the Court pointed to *Griffin v. Illinois,* 351 U.S. 12 (1956), where the refusal to furnish transcripts of trial to indigents on appeal because of inability to pay—in effect, denying the appeal—was analogized to denying the poor a fair trial. In *Gideon v. Wainwright,* 372 U.S. 335 (1963), the judgment of guilt, where the defendant had been denied counsel, lacked reliability. In *Jackson v. Denno,* 378 U.S. 368 (1964), the defendant had in essence been denied a fair trial because he was never assured a fair determination of the voluntariness of his confession. *Linkletter v. Walker, supra* at 639 n. 30.

The Court drew a sharp contrast between such cases and a case involving the use of illegally obtained evidence:

> "Here, as we have pointed out, the fairness of the trial is not under attack. All that petitioner attacks is the admissibility of evidence, the reliability and relevancy of which is not questioned, and which may well have had no effect on the outcome." *Id.* at 639.

Earlier in the opinion, the Court had noted the "complex of values" which underlies the exclusion of coerced confessions from evidence—"the likelihood that the confession is untrue;" "the preservation of the individual's freedom of will;" and " '[t]he abhorrence of society to the use of involuntary confessions.' " 381 U.S. at 638, quoting from *Blackburn v. Alabama,* 361 U.S. 199, 207 (1960). The Court then

drew a convincing distinction between the use of coerced confessions and the use of evidence which may have been illegally obtained:

> "But there is no likelihood of unreliability or coercion present in a search-and-seizure case." 381 U.S. at 638.

There is no doubt that when a defendant has been denied a fair trial, the judgment of conviction should be reversed. California does not dispute this. But we do dispute the proposition that every "constitutional error" results in the denial of a fair trial. The use of evidence which may have been illegally obtained does not deny a fair trial for the purposes of retroactive application. We submit that since there has been no denial of a fair trial and no impairment of the integrity of the fact-finding process, then it is not mandatory that any prejudicial error per se rule be applied.

A factor which seems to form at least part of the basis for requiring reversals in coerced confession cases, and which seems inevitable in cases where the error results in the denial of a fair trial, is the factor that some error is not susceptible of a reasonable degree of measurement in its impact on the trier of fact.

Where there has been a denial or abridgement of the right to counsel, as in *Hamilton v. Alabama*, 368 U.S. 52 (1961); *White v. Maryland*, 373 U.S. 59, 60 (1963); and *Glasser v. United States*, 315 U.S. 60 (1942), there is ordinarily no way to determine the degree to which an accused has been prejudiced by

denial of the right. There is thus no basis for holding that error in denying the right was harmless. Consequently, reversal follows as a matter of course. The same is true of denial of the right to an impartial judge, *Tumey v. Ohio,* 273 U.S. 510 (1927), or trial before a jury which has been exposed to prejudicial publicity. *Rideau v. Louisiana,* 373 U.S. 723 (1963).

But the amount of prejudice resulting from admission of illegally seized evidence is normally measurable. Where, as here, the record affords a reviewing court the opportunity to evaluate the illegally seized evidence in the light of its probative value and the remainder of the evidence adduced, it is often possible to come to the sound conclusion that the evidence complained of "had no effect on the outcome." *Linkletter v. Walker,* 381 U.S. 618, 639 (1965).

In *Fahy v. Connecticut, supra,* and *Stoner v. California, supra,* this Court found no difficulty in measuring the prejudice arising from the inadmissible evidence and considering its effect on other evidence introduced at the trial, its effect on the defendant and his admissions, and its effect on his testimony.

California recognizes that some errors involve a degree of prejudice which is not measurable and thus require a reversal in nearly all cases. The truth of the proposition that there may be error of this nature certainly does not support the doctrine that the harmless error rule must be discarded completely.

Finally, petitioner relies on some decisions which have required a reversal where the defendant has,

in a federal prosecution, been deprived of a specific procedural right guaranteed by the federal Constitution itself. To have a trial of a defendant in a federal court by 11 jurors without his consent requires a reversal. *Patton v. United States,* 281 U.S. 276, 292 (1930) (dictum). The attempt to put a defendant on trial in a federal court without a grand jury indictment as required by the Constitution calls for reversal. *Smith v. United States,* 360 U.S. 1, 9 (1959). Much the same reasoning has been applied in California to California convictions where the defendant has been denied a procedural right guaranteed by the California Constitution or even by California statutes. *People v. Elliott,* 54 Cal.2d 498, 354 P.2d 225 (1960). Unless the denial of a constitutional right was of such a nature that it denied the defendant a fair trial through impairing the integrity of the fact-finding process as categorized in *Linkletter v. Walker, supra,* we would expect that the state courts would be free under the United States Constitution to apply the harmless error rule or not, as they might see fit.

2. The Nearly Unanimous View of State and Federal Appellate Courts Is That the Harmless Error Rule May Be Applied to Illegal Search and Seizure Cases.

Since 1914, when the exclusionary rule in regard to evidence arising from unreasonable searches and seizures was applied to federal trials in *Weeks v. United States,* 232 U.S. 383 (1914), and since 1961, when the exclusionary rule was made applicable to state trials in *Mapp v. Ohio,* 367 U.S. 643 (1961),

there have been many cases tried in which objections were made to the admissibility of evidence on the ground that it was the product of an unreasonable search and seizure. In the vast majority of cases such evidence has been excluded on timely objection, but inevitably in a few cases the trial judge has erroneously admitted it in evidence. Sometimes this has been due to an inadequate understanding of the rules, but probably more commonly due to changes in the standards governing searches and seizures between the time of trial and the time the case is heard on appeal.

For example, in the case at bar, the search of Cooper's car a week or so after his arrest, the car being in the custody of the state pending proceedings to forfeit the vehicle, was lawful under California case law. The decisions in *Preston v. United States,* 376 U.S. 364 (1964) and *People v. Burke,* 61 Cal.2d 575 (1964), which intervened between the trial and the appeal, made the search unreasonable in the view of the state appellate court. The state appellate court in fact relied on the change in law in permitting Cooper to raise the question of illegal search and seizure on appeal.

> "We observe that the case at bench was tried in April 1962 and therefore before the decision of People v. Burke, supra, 61 Cal. 2d 575 on July 30, 1964. Applying the rationale of *Kitchens,* we conclude that the general rule of appellate review should not be made applicable here since defendant could not have anticipated the change in the law in respect to searches of impounded automo-

> biles in the lawful custody of the authorities and since we think any objection he would have made would have been futile in view of the prior decisions of appellate courts (see fn. 5 *ante*) holding in effect that legal custody of the car imparted legal possession of the contents." (R. 269).

Whether the reason is a change in the law or simply a mistake on the part of the trial judge and the prosecutor, the state and federal appellate courts are sometimes faced with cases where illegally obtained evidence has been received in evidence.

Petitioner argues that in such a case the appellate court must reverse the judgment without further ado. It must reverse the judgment without examining the record to determine whether the evidence in question in fact prejudiced the defendant. It must reverse the judgment even though the appellate court might conclude that the evidence did not prejudice the defendant and even though the judgment would be affirmed, if the evidence were inadmissible for some other reason, for example, lack of an adequate foundation or lack of a showing of a continuous chain of possession. Neither the state nor federal appellate courts by and large have accepted this startling proposition.

Probably the best discussion of this question appears in the opinion of the California Supreme Court authored by Chief Justice (then Justice) Traynor in *People v. Parham, supra.*

Parham had been convicted of three robberies in which the robber had used a pink piece of paper or

a check to demand money. Petitioner characterizes the case as involving the use of the "bloody fragments of a check that the police had brutally clubbed and choked out of the defendant . . . ." (Brief for the Petitioner 22). A reading of the opinion discloses that the defendant had been questioned in a parking area on a Friday where a stolen car used in the commission of one of the bank robberies had been abandoned on the previous Friday. The explanation that the defendant gave for being there was unlikely. When the officer asked for identification, the defendant took a money clip from his pocket, and the officer saw in the money clip a red or maroon bank passbook and a folded pink piece of paper that appeared to be a check. The officer examined a temporary driver's license produced by Parham and connected the description on the license with a Berkeley police bulletin giving an account of one of the bank robberies and containing a description and composite sketch of the robber.

The defendant told the officer that he had additional information in his car parked up the street and he voluntarily rode with the officer to the car. The defendant got in his car and while the officer stood outside the open door, the defendant took out his money clip, removed the pink paper and put the pink paper in his pocket. The officer asked him what the paper was and the defendant said that it was a check. The officer asked to see the check. The defendant withdrew it from his pocket, put it in his mouth and rolled over face down on the seat of the car, appar-

ently attempting to consume the paper. The officer got into the car and wrestled with the defendant in an attempt to extricate the check. At this point, another officer arrived and leaned through the window of the car and with the fingers of both hands began to press on defendant's cheeks, apparently to prevent the defendant from swallowing the paper. The newly arrived officer struck defendant twice on the back of the neck with a police club. Defendant then spit out the bloody fragments of the check.

While it does not appear that there was any choking involved, as suggested by petitioner, the California Supreme Court held nevertheless that clubbing a man to obtain evidence was brutal, offensive and a denial of due process. The court held that the check should not have been admitted into evidence.

However, the court did not stop at this point. After examining the entire record, the court concluded that the result would have been the same even had the check been excluded from evidence. While the check was relevant, it was merely cumulative of other undisputed evidence in the record. The possession of a pink check could be established by the officer's testimony as to what he heard and saw before any illegal conduct occurred and by the defendant's own testimony at the trial. Moreover, the other evidence of guilt was overwhelming.

The Court then dealt directly with the question of whether the harmless error rule could be applied to the case. After noting that the coerced confession

cases were in a class by themselves, Chief Justice Traynor delivered the following perceptive and persuasive analysis:

> "Unlike involuntary confessions, other illegally obtained evidence may be, as in this case, only a relatively insignificant part of the total evidence and have no effect on the outcome of the trial. To require automatic reversal because of its admission is to lose sight of the basic purpose of the exclusionary rule to deter unconstitutional methods of law enforcement. (*Elkins v. United States,* 364 U.S. 206, 217 [80 S.Ct. 1437, 1453, 4 L.Ed.2d 1688, 1669]; *Mapp v. Ohio,* 367 U.S. 643, 656 [81 S.Ct. 1684, 6 L.Ed.2d 1081, 1090-1091]; *People v. Cahan,* 44 Cal.2d 434, 443, 445 [282 P. 2d 905, 50 A.L.R.2d 513].) Unless we were to take the unprecedented step of holding that the state must be penalized for violating a defendant's constitutional rights in securing evidence by conferring an immunity upon him (see *People v. Valenti,* 49 Cal.2d 199, 203 [316 P.2d 633]), we must consider the deterrent effect of the exclusionary rule not as a penalty but as derived from the principle that the state must not profit from its own wrong. (*Walder v. United States,* 347 U.S. 62, 64-65 [74 S.Ct. 354, 98 L.Ed. 503, 506-507]; *McDonald v. United States,* 335 U.S. 451, 456 [69 S.Ct. 191, 93 L.Ed. 153, 158-159]; *People v. Martin,* 45 Cal.2d 755, 760 [290 P.2d 855].) The state does not so profit when erroneously admitted evidence does not affect the result of the trial. A reversal for the admission of illegally obtained evidence without regard for prejudice when there is compelling legally obtained evidence of guilt constitutes nothing more

than a penalty, not for the officer's illegal conduct in securing the evidence, but solely for the prosecutor's blunder in offering it and the trial court's error in admitting it. To require automatic reversal for such harmless error could not help but generate pressure to find that the unreasonable police conduct was lawful after all and thereby to undermine constitutional standards of police conduct to avoid needless retrial. (See *People v. Mickelson,* 59 Cal.2d 448, 452 [30 Cal.Rptr. 18, 380 P.2d 658]; *People v. Ditson,* 57 Cal.2d 415, 439-440 [20 Cal.Rptr. 165, 369 P.2d 714].) An exclusionary rule so rigidly administered could thereby defeat itself. We conclude that since there is no reasonable probability that the admission of the check in evidence affected the result, the judgment must be affirmed." *People v. Parham,* 60 Cal.2d 378, 385, 384 P.2d 1001, 1005 (1963), *cert. denied,* 377 U.S. 945 (1964).

In addition to California, every state court which has considered the question has held that its rule of harmless error may be applied to errors involving the admission of illegally seized evidence. *E.g., State v. Fahy,* 149 Conn. 577, 183 A.2d 256 (1962), *rev'd,* 375 U.S. 85 (1963); *Casso v. State,* 182 So. 2d 252 (Fla. App. 1966); *Dampier v. State,* 180 So. 2d 183 (Fla. App. 1965); *Whippler v. State,* 218 Ga. 198, 126 S.E. 2d 744 (1962), *cert. denied,* 375 U.S. 960 (1963); *Shelly v. State,* 108 Ga. App. 6, 132 S.E.2d 228 (1963); *Gross v. State,* 235 Md. 429, 201 A.2d 808 (1964); *Commonwealth v. Kiernan,* 348 Mass. 29, 201 N.E.2d 504 (1964), *cert. denied,* 380 U.S. 913 (1965);

State v. Sorenson, 270 Minn. 186, 134 N.W.2d 115 (1965); *Dean v. Fogliani*, 407 P.2d 580 (Nev. 1965); *State v. Doyle*, 77 N.J.Super. 328, 186 A.2d 499 (1962), *remanded*, 40 N.J. 320, 191 A.2d 478 (1963), *aff'd*, 42 N.J. 334, 200 A.2d 606 (1964); *People v. Savino*, 20 App. Div. 2d 901, 248 N.Y.S.2d 984 (1964); *State v. Thomas*, 400 P.2d 549 (Ore. 1965); *McCain v. State*, 363 S.W.2d 257 (Tex. Crim. App. 1963); *State v. Stevens*, 41 Wash.2d 694, 251 P.2d 163 (1953); *Pulaski v. State*, 24 Wis.2d 450, 129 N.W. 2d 204 (1964); *Hemmis v. State*, 24 Wis. 2d 346, 129 N.W.2d 209 (1964). Research has disclosed no state case holding to the contrary.

In addition, the vast majority of the cases in the United States Circuit Courts of Appeal which have passed upon the question have taken the same position. The following cases apply the doctrine of harmless error, either by holding or alternative holding, to errors in the admission of illegally seized evidence: *Hernandez v. United States*, 353 F.2d 624 (9th Cir. 1965); *Westover v. United States*, 342 F.2d 684 (9th Cir. 1965), *rev'd on other grounds*, 384 U.S. 436 (1966); *McDonald v. United States*, 307 F.2d 272 (10th Cir. 1962); *United States v. McCall*, 291 F.2d 859 (2nd Cir. 1961); *Woods v. United States*, 240 F.2d 37 (D.C. Cir.), *cert. denied*, 353 U.S. 941 (1957); *United States v. Perez*, 242 F.2d 867 (2nd Cir.), *cert. denied*, 354 U.S. 941 (1957); *United States v. H.J.K. Theatre Corp.*, 236 F.2d 502 (2nd Cir. 1956), *cert. denied*, 352 U.S. 969 (1957); *Dorsey v. United States*, 174 F.2d 899 (5th Cir. 1949), *cert. denied*, 338 U.S.

950 (1950); *Rogers v. United States*, 128 F.2d 973 (5th Cir. 1942.)[4]

The above cases show that of the courts which have passed upon the question, all of the state courts plus the Second, Fifth, Ninth, and Tenth Circuits have held their harmless error rules applicable to illegally seized evidence cases. Only the District of Columbia and Eighth Circuits have taken a contrary position, and even they have not done so unequivocally.[5] While

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[4] *Woods, Perez, H.J.K. Theatre Corp., Dorsey,* and *Rogers* were all decided prior to *Mapp v. Ohio*, 367 U.S. 643 (1961). Since petitioner implies that the exclusionary rule was not "recognized as a constitutional mandate" prior to *Mapp* (Brief for the Petitioner 31), he may seek to distinguish these cases on the theory that the errors there held harmless were not thought to be constitutional errors. *Mapp* itself, however, refutes this.

> "At the time that the Court held in *Wolf* that the Amendment was applicable to the States through the Due Process Clause, the cases of this Court, as we have seen, had steadfastly held that as to federal officers the Fourth Amendment included the exclusion of the evidence seized in violation of its provisions. Even *Wolf* 'stoutly adhered' to that proposition." *Mapp v. Ohio, supra*, at 655.

It follows, therefore, that the pre-*Mapp* as much as the post-*Mapp* federal cases are authority for the proposition that the harmless error rule can be applied to errors involving constitutional rights.

[5] The only cases which have held that the harmless error rule may not be applied to save convictions where illegally seized evidence has been introduced at trial are *Williams v. United States*, 263 F.2d 487 (D.C. Cir. 1959) and *Honig v. United States*, 208 F.2d 916 (8th Cir. 1953). But in neither case is it possible to say that these holdings clearly state the law of the circuits in which they were decided. The court's treatment of the subject in *Williams* is very sketchy and may possibly be dictum, in view of the fact that the court does not make clear whether admission of the illegally seized evidence could actually have prejudiced the appellant. Moreover, *Woods v. United States*, 240 F.2d 37 (D.C. Cir.), *cert. denied*, 353 U.S. 941 (1957), decided in the same circuit two years earlier, had clearly applied the harmless error rule. The *Williams* court's failure even to cite *Woods*, much less overrule it,

the decisions of state and lower federal courts do not, of course, control this Court in its constitutional adjudications, they do represent the overwhelming weight of authority and should not be lightly dismissed.

The proposition that a harmless error rule may be applied in illegally seized evidence cases also has the support of sound scholarly opinion. See 64 Colum. L. Rev. 367 (1964); 1963 U. Ill. L.F. 714; 25 U. Pitt. L. Rev. 601 (1964).

3. To Apply a Reversible Per Se Rule to Cases Involving the Admission of Illegally Obtained Evidence Would Require That This Court Hold the Harmless Error Rule as Enacted by Congress and All the States Unconstitutional at Least in Part.

In urging the Court to reject its own prior decisions and the nearly unanimous view of the state and federal appellate courts, petitioner seeks to establish a reversible error per se rule for illegally obtained evidence and even for the vague concept of "constitutional error."

The reversible per se or presumption of prejudice rule which persisted in the second half of the

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leaves the position of the District of Columbia Circuit somewhat in doubt. Two years after the decision in *Honig*, the Eighth Circuit decided *Hobson v. United States*, 226 F.2d 890 (8th Cir. 1955), in which reversal was based on the fact that the trial court's opinion made it clear that the conviction was based on the consideration of illegally seized evidence. If the court had desired to approve *Honig*, it would have based reversal on the non-applicability of the harmless error doctrine, rather than on the proposition that the error was not in fact harmless. The *Hobson* case, therefore, casts some doubt on the present validity of *Honig*.

Nineteenth Century was a painful chapter in the history of criminal jurisprudence. Historical reiteration is unnecessary as this Court is well aware of the nation-wide movement which overcame the per se rule and the corresponding emergence of the harmless error concept. *Kotteakos v. United States,* 328 U.S. 750, 758-766 (1946). After a lengthy reign, the reversible per se rule was found to be totally unsatisfactory and finally was vehemently and overwhelmingly rejected in the early 1900's.

The fundamental fault in the presumption of prejudice concept was the substitution of mechanical rules for the trusted judgment of appellate courts. Yet despite prior experience, petitioner would have this Court refabricate a presumption of prejudice for errors in the admission of evidence, which although unconstitutionally seized, is not inherently prejudicial. The resurrection of such a presumption would once again deprive appellate courts of their role in implementing the concepts of fairness and due process.

In order to recreate a per se rule for errors involving the admission of unconstitutionally seized evidence, this Court would have to declare unconstitutional, at least in part, the following:

1. An Act of Congress; 63 Stat. 105 (1949), 28 U.S.C. § 2111 (1964).[6]

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[6]The federal statute reads as follows:

"On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties."

2. The statutes or rules of 37 states.[7]

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[7](1) *Alabama:* 5 Ala. Code tit. 15, § 389 (1958), and Ala. Sup. Ct. R. 45.
(2) *Alaska:* Alaska R. Crim. P. 47(a).
(3) *Arizona:* Ariz. R. Civ. P. 61, which is applied to criminal cases by Ariz. Sup. Ct. R. 15.
(4) *Arkansas:* 4A Ark. Stat. § 43-2725 (1964).
(5) *California.*
(6) *Colorado:* Colo. R. Crim. P. 52(a).
(7) *Connecticut:* IX Conn. Gen. Stat. § 52-265 (1958), which is applied to criminal cases, see *State v. Fahy*, 149 Conn. 577, 588, 183 A.2d 256, 262 (1962), *rev'd on other grounds*, 375 U.S. 85 (1963).
(8) *Delaware:* Del. Super. Ct. R. Crim. 52(a).
(9) *Florida:* 1 Fla. Stat. § 54.23 (1965), and 2 Fla. Stat. § 924.33 (1965).
(10) *Idaho:* 4 Idaho Code §§ 19-2819, 19-3702 (1947).
(11) *Illinois:* Ill. Ann. Stat. ch. 38, § 121-9 (1964).
(12) *Indiana:* 4(1) Ind. Stat. Ann. § 9-2320 (1956).
(13) *Iowa:* 57 Iowa Code Ann. § 793.18 (1946).
(14) *Kansas:* 4 Kan. Stat. Ann. § 62-1718 (1963).
(15) *Kentucky:* Ky. Crim. Code §§ 340, 353 (1880).
(16) *Louisiana:* 12 La. Rev. Stat. § 15:557 (1950), and La. Code Crim. P. § 921 (1966) (effective Jan. 1, 1967).
(17) *Maryland:* 1 Md. Code Ann. art. 5, § 16 (1957), or *Moxley v. State*, 205 Md. 507, 517, 109 A.2d 370, 374 (1954) (indicating application of judicial "harmless error" rule if article 5, section 16, is insufficient to do so).
(18) *Michigan:* Mich. Gen. Ct. R. 529.1.
(19) *Missouri:* Mo. R. Civ. P. 83.13(b), as applied to criminal appeals by Mo. R. Crim. P. 28.18.
(20) *Montana:* 8 Mont. Rev. Codes § 94-8207 (1947), which applies to erroneous admission of evidence, see *State v. Bubnash*, 142 Mont. 377, 393-94, 382 P.2d 830, 838 (1963).
(21) *Nebraska:* 2A Neb. Rev. Stat. § 29-2308 (1956).
(22) *Nevada:* 2 Nev. Rev. Stat. §§ 169.110, 177.230 (1911).
(23) *New Jersey:* N.J. Sup. Ct. R. 1:5-1(a).
(24) *New Mexico:* 6 N.M. Stat. § 41-14-12 (1953), incorporating 4 N.M. Stat. § 21-2-1, (17.10) at 493, (61) (1953).
(25) *New York:* N.Y. Code Crim. P. § 542 (1958), which applies to erroneous admission of evidence, see *People v. Silverman*, 181 N.Y. 235, 73 N.E. 980 (1905).
(26) *North Dakota:* 5 N.D. Cent. Code § 29-28-26 (1960), which applies to erroneous admission of evidence, see *State v. Pusch*, 77 N.D. 860, 898, 46 N.W.2d 508, 527 (1950).

3. The carefully considered judicial positions of 13 additional states.[8]

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(27) *Ohio:* Ohio Rev. Code § 2945.83 (1953), which applies to criminal cases, see *State v. Alexander*, 55 Ohio L. Abs. 55, 57, 130 N.E.2d 378, 379 (2d Dist. Ct. App. 1954); see also Ohio Rev. Code Ann. tit. 59, § 5924.59(A) (Supp. 1966) (Code of Military Justice).

(28) *Oklahoma:* 1 Okla. Stat. tit. 22, § 1068 (1961).

(29) *Oregon:* Ore. Const. art. VII, § 3, which applies to errors in admission of evidence, see *State v. Quartier*, 114 Ore. 657, 674, 236 Pac. 746, 751 (1925); 1 Ore. Rev. Stat. § 138.230 (1959), which applies to errors in admission of evidence, see *State v. Story*, 208 Ore. 441, 446, 301 P.2d 1043, 1045 (1956).

(30) *South Dakota:* 2 S.D. Code § 34.2902 (Supp. 1960), or see *State v. Reddington*, 80 S.D. 390, 397, 125 N.W.2d 58, 62 (1963). (suggesting existence of pre-statutory judicial "harmless error" rule), and *cf. State v. Butler*, 71 S.D. 455, 459, 25 N.W.2d 648, 650 (1946) (suggesting applicability of "harmless error" rule to questions of evidence).

(31) *Tennessee:* 5 Tenn. Code Ann. §§ 27-116, 27-117 (1956), and Tenn. Sup. Ct. R. 14(6).

(32) *Utah:* 8 Utah Code Ann. § 77-42-1 (1953), which applies to errors in admission of evidence, see *State v. Sibert*, 6 Utah 2d 198, 204, 310 P.2d 388, 392 (1957).

(33) *Vermont:* Vt. Sup. Ct. R. 9.

(34) *Virginia:* 2 Va. Code § 8-487(8) (1957), which applies to errors in admission of evidence, see *Simmons v. Boyd*, 199 Va. 806, 812-13, 102 S.E.2d 292, 296-97 (1958), and to criminal cases, see *Elliott v. Commonwealth*, 172 Va. 595, 601, 1 S.E.2d 273, 276 (1939).

(35) *Washington:* Wash. Rev. Code Ann. tit. 4, § 4.36.240 (1950) (civil procedure), which has been applied to criminal cases, see *State v. Slater*, 36 Wash. 2d 357, 361, 218 P.2d 329, 331 (1950) (citing what is now section 4.36.240).

(36) *Wisconsin:* Wis. Stat. Ann. § 274.37 (1958).

(37) *Wyoming:* Wyo. R. Civ. P. 1, which applies Wyo. R. Civ. P. 72(g) to criminal appeals.

[8](1) *Georgia: Humphreys v. State*, 45 Ga. 190 (1872); *Dukes v. State*, 109 Ga. App. 825, 829, 137 S.E.2d 532, 535 (1964); *Miller v. State*, 94 Ga. App. 259, 264, 94 S.E.2d 120, 123 (1956).

(2) *Hawaii: State v. Hashimoto*, 46 Hawaii 183, 377 P.2d 728 (1962).

4. The statutes of 3 territories.[9]

In addition, it should be noted that both Great Britain and Canada have similar statutes which are respectively considered indispensable to the effective administration of justice.[10] The Anglo-American ju-

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(3) *Maine: State v. Smith*, 140 Me. 255, 275, 37 A.2d 246, 255 (1944); *State v. Cloutier*, 134 Me. 269, 278, 186 Atl. 604, 609 (1936); *State v. Priest*, 117 Me. 223, 231, 103 Atl. 359, 363 (1918).

(4) *Massachusetts: Commonwealth v. Smith*, 342 Mass. 180, 188, 172 N.E.2d 597, 603 (1961).

(5) *Minnesota: State v. Mitchell*, 268 Minn. 513, 521, 130 N.W. 2d 128, 133 (1964), *cert. denied*, 380 U.S. 984 (1965); *State v. Keaton*, 258 Minn. 359, 366, 104 N.W.2d 650, 656 (1960).

(6) *Mississippi: Coggins v. State*, 222 Miss. 49, 63, 75 So.2d 258, 265 (1954).

(7) *New Hampshire: State v. Amero*, 106 N.H. 134, 137, 207 A.2d 440, 442 (1965).

(8) *North Carolina: State v. Rowland*, 263 N.C. 353, 360-61, 139 S.E.2d 661, 666 (1965); *State v. Woolard*, 260 N.C. 133, 138, 132 S.E.2d 364, 368 (1963).

(9) *Pennsylvania: Commonwealth v. Barnak*, 357 Pa. 391, 419, 54 A.2d 865, 878 (1947); *Commonwealth v. Savor*, 180 Pa. Super. 469, 573-74, 119 A.2d 849, 851 (1956), *aff'd*, 386 Pa. 523, 126 A.2d 444 (1956), *cert. denied*, 353 U.S. 958 (1957).

(10) *Rhode Island: State v. Brown*, 191 A.2d 353, 354 (1963); see also 5 R.I. Gen. Laws § 30-13-69(a) (Supp. 1965) (Code of Military Justice).

(11) *South Carolina: State v. Smith*, 245 S.C. 59, 63, 138 S.E. 2d 705, 706 (1964); *State v. Harriott*, 210 S.C. 290, 298, 42 S.E.2d 385, 388 (1947).

(12) *Texas: Perdue v. State*, 171 Tex. Crim. 332, 333, 350 S.W. 2d 203, 204 (1961); *Girvin v. State*, 112 Tex. Crim. 355, 358, 15 S.W.2d 643, 645 (1929).

(13) *West Virginia: State v. Lewis*, 133 W. Va. 584, 599, 57 S.E.2d 513, 524 (1950); *State v. Bragg*, 105 W. Va. 36, 38, 141 S.E. 400, 401 (1928).

[9](1) *Canal Zone:* 2 C.Z. Code tit. 6, § 3501(a) (1963), which adopts the Federal Rules.

(2) *Guam:* Guam R. Crim. P. 25(a).

(3) *Puerto Rico:* 10 P.R. Laws Ann. tit. 34, §§ 1171-72 (1956).

[10]Criminal Appeal Act, 1907, 7 Edw. 7, c. 23; Can. Rev. Stat. c. 51, § 592 (1954).

risdictions are thus united in their adoption of the harmless error concept and a corresponding rejection of the antiquated presumption of prejudice doctrine.

In comparison, three recent landmark decisions of this Court have recognized that the prevailing trend among the states was toward the position adopted.

In *Mapp v. Ohio,* 367 U.S. 643 (1961), this Court noted that "while in 1949, prior to the *Wolf* case, almost two-thirds of the states were opposed to the use of the exclusionary rule, now, despite the *Wolf* case, more than half of those since passing upon it, by their own legislative or judicial decision, have wholly or partly adopted or adhered to the *Weeks* rule. See *Elkins v. United States,* 364 U.S. 206, Appx. pp. 224-232." *Id.* at 651. The Court also made special mention of the fact that California was a leader in this trend toward adoption of an exclusionary rule, citing *People v. Cahan,* 44 Cal.2d 434, 282 P.2d 905 (1955). *Ibid.*

In *Gideon v. Wainwright,* 372 U.S. 335 (1963), this Court again recognized the prevailing nationwide sentiment. It found that only three states had voiced an opinion in favor of *Betts v. Brady,* 316 U.S. 455 (1942), while twenty-two other states, as friends of the Court, believed that the *Betts* case "was 'an anachronism when handed down' and that it should now be overruled." *Id.* at 345.

In regard to the comment rule this Court found that "the overwhelming consensus of the states . . . is opposed to allowing comment on the defendant's

failure to testify. The legislatures or courts of 44 states have recognized that such comment is, in light of the privilege against self incrimination, 'an unwarrantable line of argument.' [Citation.]" *Griffin v. California,* 380 U.S. 609, 611, n. 3 (1965).

In sharp contrast to the trends recognized in the preceding cases, there is today a total absence of sentiment in favor of a return to the reversible per se rule regarding errors in admitting unconstitutionally seized evidence among those states which have experienced the harmless error concept. In addition to the initial surge to incorporate the harmless error concept in the early years of this century, there is a continuing trend toward the harmless error concept. More states are becoming convinced that the orderly administration of justice is not enhanced by adherence to the old reversible per se rule.

4. The Application by the State and Federal Appellate Courts of the Harmless Error Rule to the Admission of Illegally Obtained Evidence Would Not Impair the Deterrent Effect of the Exclusionary Rule.

Bereft of support in the decisions of this Court or the state and federal appellate courts, petitioner falls back on the tired but perennial slogan that "lawless law enforcement" must be deterred. (Brief for the Petitioner 34). We do not dispute the proposition that lawless law enforcement must be deterred. The point is that the judicial repeal of the harmless error rule will not deter violations of the Fourth Amendment.

The harmless error rule does not bear directly or indirectly upon the protection of the Fourth Amendment to the United States Constitution. The constitutional standards governing searches and seizures are expressed in many opinions of this Court and of the state and federal appellate courts, and California has sought as best it could to comply with those standards and apply them to state proceedings. Whether or not the harmless error rule survives in search and seizure cases will not in any way expand or increase the protections of the Fourth Amendment. It is conceivable, as Chief Justice Traynor pointed out in *People v. Parham, supra*, that a rule requiring reversal without regard to the effect of the error might, consciously or subconsciously, induce appellate judges to limit the scope of the Fourth Amendment to prevent unnecessary and unwarranted reversals. It is inconceivable, however, that abolishing the harmless error rule could in any way expand upon the protection of the Fourth Amendment.

Take the case at bar as an example. The District Court of Appeal held that the search of a vehicle several days after the arrest without a search warrant was unreasonable and the product of that search inadmissible even though the car had been seized and was subject to forfeiture to the state. This ruling is binding upon law enforcement officers, prosecutors, trial courts and magistrates. In declaring the search unreasonable, the state appellate court was performing its historic office of interpreting and applying the Fourth Amendment and both declaring the rights of

the citizenry and the duty of law enforcement officers and lower courts. The publication of the opinion gives guidance to officers and lower court judges and prosecutors so that they can conform with constitutional requirements in the future. Incidentally, moral blame can scarcely be cast upon the officers, the prosecutor or the trial judge in the case at bar, since the state appellate court held that under the law as understood at the time of the search and the trial, the search was reasonable and the evidence obtained thereby admissible. It was only an intervening change in the law that made the evidence inadmissible. Curiously enough, had the case been taken by the federal government—and federal agents did participate in the investigation and the arrest—the evidence in question would have been admissible in the federal courts under the Fourth Amendment. See *Burge v. United States,* 342 F.2d 408 (9th Cir.), *cert. denied,* 382 U.S. 829 (1965). Nevertheless, the decision of the state appellate court would make it clear that a search of a vehicle under the circumstances here involved would be unreasonable, and the products of such search inadmissible in evidence.

But the state appellate court had another historic office to perform. And that was to dispose of Joe Cooper. In determining whether Cooper's conviction would be affirmed or reversed, the state appellate court had to abide by the California Constitution, as the Justices have sworn to do, and appraise the effect of the erroneously admitted evidence in light of the outcome of the trial. It did so, and determined that

a reversal was not warranted. But, in arriving at this conclusion, the Court is not concerned with the Fourth Amendment, with the duty of officers under that amendment, or with the rights of citizens under that amendment. It is concerned only with the effect of the evidence, regardless of the reason for its inadmissibility. The difference in these functions must be clearly recognized.

It is clear then that the harmless error rule, or to put it more accurately, the rule governing the disposition of cases on appellate review, is a rule of judicial administration which regulates the relations between appellate courts and trial courts. It is not a rule that measures the nature or extent of constitutional rights. It neither enhances nor limits constitutional rights.

Nevertheless, the petitioner argues that the harmless error rule does have an effect on the enforcement of the rules governing search and seizure in at least two ways.

First, he argues that the rule will tempt police to search unconstitutionally for and seize evidence to shore up weak cases, apparently relying on the harmless error rule to uphold the conviction. He suggests that prosecutors will be tempted to "button up" their cases by the use of illegally obtained evidence, hoping for the "saving grace" of the harmless error rule. Finally, he thinks that trial court judges will resolve differences of opinion against constitutional rights, again relying on that self-same "saving grace." Consequently, he argues that while an occasional convic-

tion upon a weak case will be reversed, many close cases will result in affirmed convictions and almost all strong cases will be allowed to stand. As a result there will be no effective remedy for unconstitutional searches and seizures. He invokes the spectacle of a possibly innocent man in a weak and close case, apparently being injured in some way by the application of the harmless error rule. At this point he refers to a lengthy Appendix attached to his brief which lists a considerable number of cases in which the harmless error rule has been applied in California in relation to constitutional errors. (Brief for the Petitioner 35.)

This argument conjures up a spectacle which, if true, might give pause to the Court. The trouble is that the argument is based upon both an unrealistic and naive view of the impact of exclusionary rules upon police activity and a failure to appreciate at all California criminal procedure and the remedies available to an accused defendant. Moreover, the Appendix adds apples and oranges as if they were the same and presents only a partial and a very misleading picture of the appellate situation in California.

Deterrence is mainly achieved by informing and training law enforcement officers so that they can comply with the requirements of the search and seizure rules. The education and training of law enforcement officers does not spring full blown from the minutes of the state appellate courts or this Court. A costly and demanding program is required,

and it is probably fair to say that we have only started upon an adequate program of this kind. Nevertheless, such programs are the only answer to insuring the protection of the constitutional rights of the individual and insuring that admissible evidence is secured so that guilty persons may be apprehended and removed from society.

We do not, of course, dispute the conclusion of this Court in *Mapp v. Ohio, supra,* preceded as it was a decade earlier by the California Supreme Court in *People v. Cahan, supra,* that the exclusionary rule is necessary in order to put teeth into the Fourth Amendment.

But the exclusionary rule in California is given effect in a variety of ways. Probably the most important effect, from the standpoint of the citizen, arises from the restraint shown by police officers when they feel, as a result of the educational and training programs earlier mentioned, that they cannot lawfully make a search under the circumstances and in light of the controlling principles of law. If the officer makes the search under questionable circumstances, the question of the reasonableness of the search and seizure will be reviewed by the district attorney in determining whether to issue a felony complaint or take the case to the grand jury, and there is no question that the products of many bad searches or borderline searches are excluded at that time. Thus, the impact of the exclusionary rule is frequently felt before the case ever reaches the court. Probably the impact is most significant upon a police officer

when his own superior refuses to take a case to the district attorney because he has doubts about the search or when the district attorney rejects the case on the ground that the search was unreasonable.

If the district attorney feels that he can proceed with the case, the defendant may object to the evidence at the preliminary examination and the magistrate will exclude the evidence if he is satisfied that there was an unreasonable search and seizure and the case goes no further. If the magistrate receives the evidence and the defendant is bound over to the Superior Court, he may move to set aside the information under section 995 of the Penal Code and in most cases raise the search and seizure question. If that motion is denied, he may apply to the District Court of Appeal under section 999a of the Penal Code for a writ of prohibition raising the question of illegal search and seizure. If the District Court of Appeal denies his petition, he may petition the California Supreme Court for a hearing. If he is unsuccessful in his pre-trial motions and in seeking appellate review, he may raise the question again during the trial by a timely objection to the evidence. If that objection is overruled and he is convicted, he may again raise the question on motion for new trial in the superior court. If that motion is denied, he may appeal from the judgment of conviction or order granting probation and raise the question in the appellate court.

We cannot believe that any police officer or prosecutor would rely on the "harmless error" rule and

anticipate that every magistrate and judge involved will rule erroneously and receive the evidence and that ultimately the judgment will be affirmed by the appellate justices on the ground of harmless error.

In any event, the prosecutor does not decide questions of admissibility; he can only offer evidence. Our experience does not indicate that the trial judges in California are the submissive dupes that petitioner seems to imagine them to be. If anything, the complaints we receive from district attorneys tend to indicate a reluctance to receive evidence which is questionable in any degree on the theory, which is a sound one from the trial judge's standpoint, that he cannot err in excluding prosecution evidence. He will never be reversed for sustaining an objection to the People's evidence.

We have to agree with Mr. Justice Harlan, that "... there is no danger that application of the [harmless error] rule will undermine the prophylactic function of the rule of inadmissibility." *Fahy v. Connecticut*, 375 U.S. at 94 (dissenting opinion).

Finally, it has been suggested, however, that deterrence of Fourth Amendment violations is not the sole purpose of the exclusionary rule. *Linkletter v. Walker*, 381 U.S. 618, 649 (1965) (dissenting opinion of Mr. Justice Black). If this is true, then another purpose must be the rectification of the denial of constitutional rights. Unreasonable searches and seizures constitute, in themselves, the primary violations of constitutional rights.

This Court has never had occasion to decide whether a separate violation of a constitutional right occurs when illegally seized evidence is used in a trial. The Fourteenth Amendment provides, in part, that: "No state shall . . . deprive any person of life, liberty, or property without due process of law." This language implies that there can be no denial of due process until a person has actually been deprived of life, liberty, or property. It follows that the mere use during a trial of unconstitutionally obtained evidence does not, in itself, violate due process, since a person against whom such evidence has been used may nonetheless be acquitted, and one who has been acquitted cannot be said to have been denied due process. The logical conclusion is that a denial of due process has occurred only when a conviction has been obtained through the use of illegally seized evidence.

The basic premise of the harmless error rule, as applied in illegally seized evidence cases, is that the evidence played no part in securing the conviction. This being true, how can it be said that the introduction at trial of unconstitutionally obtained evidence which in fact is harmless constitutes a separate denial of constitutional rights? Therefore, if one of the purposes of the exclusionary rule is to rectify the denial of a constitutional right, the right in question is the right to avoid being convicted through the use of unconstitutionally obtained evidence, and the harmless error rule is applied in order to hold that such evidence played no part in securing a conviction, then the harmless error rule does not prevent the fulfill-

ment of this purpose of the exclusionary rule. As this Court has observed, the exclusionary rule can never rectify the primary violation of the Fourth Amendment—the unreasonable search and seizure itself: "[T]he ruptured privacy of the victims' homes and effects cannot be restored. Reparation comes too late." *Linkletter v. Walker,* 381 U.S. 618, 637 (1965).

A word must be said about Appendix A attached to the brief for the petitioner. This appendix lists a number of California cases falling into three categories in which errors were found and yet convictions were affirmed on the basis of the harmless error rule. The appendix is relied on for the proposition that violations of constitutional rights are encouraged by the harmless error rule as purportedly demonstrated by the frequency with which the appellate courts in California have found it necessary to invoke that rule (Brief for the Petitioner 35).

Let us take a closer look at the appendix. The first page lists seven cases in which the harmless error rule was applied to cases where illegally obtained evidence had been received in the course of the trial. Only two of these cases are from the California Supreme Court. One is *People v. Parham, supra,* which we have discussed at length. The other is *In re Shipp,* 62 Cal.2d 547, 399 P.2d 571 (1965), which principally involved the question of collateral attack, and while there is some mention of the harmless error rule the basic holding is that California does not permit collateral attack because of unreasonable search and seizure at all. See *In re Sterling,* 63 Cal.2d 486, 407 P.2d 5

(1965). The remaining five cases are from the intermediate appellate courts and include among their number the case at bar. In order to put these five affirmances in context, we have examined all the decisions of the intermediate appellate courts since 1961 when *Mapp v. Ohio* was decided. We found 372 decisions. In 367 of those cases the decision turned on the merits of the search and seizure. If the search was good, the conviction was affirmed. If the search was bad, the conviction was reversed or a writ of prohibition granted depending on the procedural posture of the case. It is difficult to find in these numbers any frequency of decisions affirming convictions on the basis of the harmless error rule in the face of an illegal search and seizure—5 out of 372 published opinions—so that the violation of constitutional rights is encouraged to any degree whatever.

We will not comment upon the third category of cases since they involve affirmances despite a *Griffin* error and are intimately related to *Chapman v. California,* No. 95, now pending in this Court.

The second category of cases is of an entirely different order. They are purportedly listed as cases involving the "ADMISSION OF UNCONSTITUTIONALLY OBTAINED STATEMENTS IN VIOLATION OF ESCOBEDO V. ILLINOIS, 378 U.S. 478 (1964)." (Brief for the Petitioner 55).

These cases are not "*Escobedo*" cases at all as the binding import of that decision was limited in *Johnson v. New Jersey,* 384 U.S. 719 (1966). They are what we have referred to in California as "*Dorado*"

cases. To briefly recapitulate the history, the California Supreme Court in January of 1965 held that under the compulsion of *Escobedo* any statement of a defendant was inadmissible in evidence unless the record established that the defendant had been warned of his right to counsel and his right to remain silent, provided that the defendant was in custody at the time and that the investigation had focused upon him, and that he was subjected to a process of interrogations designed to elicit incriminating statements. *People v. Dorado,* 62 Cal.2d 338, 398 P.2d 361, *cert. denied,* 381 U.S. 937, 946 (1965).

The fact was that the cases which were then pending on appeal had been investigated and had been tried under the belief by law enforcement officers, prosecutors, and trial judges—and at that time a well-founded belief—that the giving of the warnings of right to counsel and right to remain silent were material factors in determining voluntariness but not essential conditions of admissibility. Consequently, it was unusual when the record would establish the giving of the requisite warnings. In applying the *Dorado* rule the California Supreme Court drew a distinction, not in regard to admissibility, but in regard to the application of the harmless error rule. Deeming itself bound by the coerced confession cases, the Court held that it would reverse whenever a confession had been received in evidence in violation of the *Dorado* rule. However, where the statement of the defendant constituted only a minor admission or an exculpatory statement, then the Court would consider the prejudice to the defendant arising from the use of

the statement and reverse or affirm, depending on whether the statement was prejudicial within the meaning of the harmless error rule: *People v. Hillery*, 62 Cal.2d 692, 401 P.2d 382 (1965). The result has been in part the line of cases cited in Appendix A in which judgments have been affirmed even though a statement was received which was in violation of the *Dorado* rule. Petitioner has not cited the longer list of cases in which judgments were reversed because the statement constituted a confession and not merely an exculpatory statement or a minor admission.

There are several interesting features about this line of cases. First of all, *Johnson v. New Jersey*, 384 U.S. 719 (1966), made it clear that even the reversals were not necessary in light of *Escobedo* unless there had been a request for counsel and the other specific conditions of that decision met. *A fortiori*, there was no need for the state appellate courts to determine in the cases listed in the Appendix that the reception into evidence of a statement was erroneous. As far as the United States Constitution is concerned, these were not errors at all. Secondly, while it is true that the California courts believed that these were federal constitutional errors, they also felt that reversal was not compelled in all cases unless the statement constituted a confession. The validity of this distinction is one that may some day be decided, although it is not essential to the decision here. If our analysis of the coerced confession cases is correct and the rule of reversal hinges on the effect of a confession, then it would seem reasonable to permit the application of the harmless error rule to utterances which are less

than a confession and which may or may not, depending on the circumstances, prejudice the defendant.

In any event, the *Dorado* cases, while constituting an interesting period in California legal history, scarcely warrant the charge that they constitute a "blueprint for evasion of *Miranda v. Arizona*" (Brief for the Petitioner, Appendix A).

The notion that this Court must strike down the harmless error rule as enacted by Congress and as enacted and applied by the states of the Union in order to prevent the California appellate judges from executing some kind of a conspiratorial and diabolical "blueprint for evasion of *Miranda v. Arizona*" must rank as one of the most startling and perplexing statements to be encountered in recent years. To any one familiar with the last decade of California judicial decisions, this suggestion is preposterous and insulting, not to us, but to the appellate judges who have ironically been the target for a good deal of criticism on the ground that they have been over-zealous in protecting constitutional rights.

Moreover, even from a national standpoint, the petitioner is on no stronger ground. His entire attack on the concept of harmless error is instinct with the notion that the states, and their appellate courts, cannot be trusted to protect federal constitutional rights. The facts refute this claim of infidelity to our Constitution.

Twenty-six state jurisdictions, by legislative act or judicial decree, applied an exclusionary rule to evidence illegally seized by state officers two years before

this was made mandatory in *Mapp v. Ohio*, 367 U.S. 643 (1961). *Elkins v. United States*, 364 U.S. 206, 224 (1960) (Appendix).

In *Gideon v. Wainwright*, 372 U.S. 335, 336, 345 (1963), twenty-two states, as *amicus curiae*, urged this Court to reverse *Betts v. Brady*, 316 U.S. 455 (1962).

Forty-four states prohibited the type of prosecutorial comment condemned in *Griffin v. California*, 380 U.S. 609, 611, n. 3 (1965). The remaining six states, this Court has emphasized, in approving a contrary practice acted "in the utmost good faith."

A few state courts anticipated, rightly or wrongly, this Court's extension of *Escobedo v. Illinois*, 378 U.S. 478 (1964) in *Miranda v. Arizona*, 384 U.S. 436 (1966). *People v. Dorado*, 62 Cal.2d 338, 398 P.2d 361, *cert. denied* 381 U.S. 937 (1965); *State v. Neely*, 239 Or. 487, 398 P.2d 482 (1965); *State v. Dufour*, 206 A.2d 82 (R.I. 1965). These states proceeded without knowing whether the newly recognized right was founded upon the Fifth Amendment or upon the Sixth Amendment. Amidst such confusion, the majority of states were reasonable in their disinclination to go beyond *Escobedo*. *Johnson v. New Jersey*, 384 U.S. 719 (1966) confirms the propriety of their reluctance.

There has been a state vanguard in the recognition of the constitutional rights of the criminal defendant. It has not been comprised of a certain coterie of progressive states. Every state, excepting New Jersey and New Mexico, has preceded this Court in its recognition of a constitutional right established by at least one of the following cases: *Mapp v. Ohio; Gideon*

v. Wainwright; Escobedo v. Illinois; Griffin v. California.[11]

5. This Court Should Not Assume That State and Federal Appellate Courts Will Rely On the Harmless Error Rule to Circumvent the Protections of the United States Constitution.

Probably the least defensible argument urged by the petitioner is that the harmless error rule, if permitted to survive, will be the vehicle for appellate judges to circumvent the protections of the United States Constitution. The argument, apparently, is that the appellate judges, both state and federal, will be impelled to find that there was constitutional

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[11]Summary of antecedent state recognition of constitutional rights established by this Court in the listed cases:

State:	Constitutional Right Recognized in:
Alabama:	Mapp; Griffin
Alaska:	Mapp; Gideon; Griffin
Arizona:	Gideon
Arkansas:	Gideon
California:	Mapp; Miranda
Colorado:	Gideon; Griffin
Connecticut:	Gideon
Delaware:	Mapp; Griffin
Florida:	Mapp; Griffin
Georgia:	Gideon; Griffin
Hawaii:	Mapp; Gideon; Griffin
Idaho:	Mapp; Gideon; Griffin
Illinois:	Mapp; Gideon; Griffin
Indiana:	Mapp; Griffin
Iowa:	Gideon
Kansas:	Griffin
Kentucky:	Mapp; Gideon; Griffin
Louisiana:	Griffin
Maine:	Gideon; Griffin
Maryland:	Mapp; Griffin
Massachusetts:	Gideon; Griffin
Michigan:	Mapp; Gideon; Griffin
Minnesota:	Gideon; Griffin

error but they will unjustifiably dismiss it as mere harmless error.

It is true that judges will differ in their views on the results in the application of the harmless error rule. It is not unusual to find dissenting opinions of judges who feel that an error was prejudicial or not prejudicial depending upon the record and all the circumstances in the case. See, for example, *Kotteakos v. United States*, 328 U.S. 750 (1946), where Justice Douglas dissented from the order reversing the conviction on the ground that the error was harmless. But this is true of all questions of law, and the sug-

State:	Constitutional Right Recognized in:
Mississippi:	Mapp; Griffin
Missouri:	Mapp; Gideon; Griffin
Montana:	Mapp; Griffin
Nebraska:	Griffin
Nevada:	Gideon; Griffin
New Hampshire:	Griffin
New Jersey:	
New Mexico:	
New York:	Griffin
North Carolina:	Mapp; Griffin
North Dakota:	Gideon; Griffin
Ohio:	Gideon
Oklahoma:	Mapp; Griffin
Oregon:	Mapp; Gideon; Griffin; Miranda
Pennsylvania:	Griffin
Rhode Island:	Mapp; Gideon; Griffin; Miranda
South Carolina:	Griffin
South Dakota:	Mapp; Gideon; Griffin
Tennessee:	Mapp; Griffin
Texas:	Mapp; Griffin
Utah:	Griffin
Vermont:	Griffin
Virginia:	Griffin
Washington:	Mapp; Gideon; Griffin
West Virginia:	Mapp; Gideon; Griffin
Wisconsin:	Mapp; Griffin
Wyoming:	Mapp; Griffin

gestion seems to be, not that the appellate judges will make mistakes, but that they will consciously apply the harmless error rule in order to avoid the enforcement of constitutional rights.

This approach brings full circle an argument advanced periodically. The police cannot be trusted. The prosecutors cannot be trusted. The trial judges cannot be trusted. And now it is said the appellate judges cannot be trusted. No doubt that public officers, including judges, make mistakes, but to predicate a constitutional ruling on the assumption that appellate judges will misuse and distort what is otherwise a valid rule in order to deny constitutional rights is to accept either a paranoiac view of the universe, or, if this view is a true one, to perpetuate a system of the administration of justice which should be done away with. We cannot accept the proposition that the appellate judges will misuse this doctrine. In fact, we believe the contrary to be the case, and we think this Court should make it clear that it does not accept this unwarranted suspicion.

B. The California Standard of Harmless Error May Be Applied to Illegally Obtained Evidence Without Impairing the Protections Guaranteed by the United States Constitution.

Petitioner seems to assume that if any harmless error rule may be applied in a case involving illegally obtained evidence then the standard of harmless error must be that stated in *Fahy v. Connecticut*, to wit, whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction (375 U.S. at 86-87).

The majority opinion in *Fahy v. Connecticut* did not purport to determine what standard might be applicable, although the majority opinion does appear to assume that the federal standard is controlling.

> "On the facts of this case, it is not now necessary for us to decide whether the erroneous admission of evidence obtained by an illegal search and seizure can ever be subject to the normal rules of 'harmless error' under the federal standard of what constitutes harmless error. Compare *Ker v. California*, 374 U.S. 23." 375 U.S. at 86.

We cannot construe this language as foreclosing the question of the permissible standard. We have examined the record before the Court in *Fahy* and find no discussion whatever of this question in the briefs. The opinion does not purport to deal with the question at any length nor does it refer to any supporting authorities or any of the considerations which might underlie a decision of that kind.

Justice Harlan, in his dissenting opinion joined in by three other Justices, appears to agree with this conclusion.

> "There is no need to consider whether a state or federal standard of harmless error governs since the state standard applied here is as strict as any possible federal standard." 375 U.S. at 95, n. 2.

We think that the Court should decide the question of the permissible standard, if any standard of harmless error is permissible. And we see no reason why the California standard should not be held valid. This

standard was adopted in 1911 by vote of the people and re-enacted on November 8, 1966 by the people as a part of the newly revised constitution of the state.[12] We think that if a portion of the state Constitution is to be struck down in whole or in part then a decent respect for the people of California requires that some consideration be given to the question of its validity.

1. There Is No Reason to Impose a Uniform Standard of Appellate Review on the States Nor to Alter the Federal Rule as Enacted by Congress.

There may be some superficial appeal to the notion that a uniform rule of appellate review should be applicable throughout the length and breadth of this country when the question raised on appeal involves a denial of federal constitutional rights. We think the appeal, upon careful consideration, is more to the aesthetic sense and the desire for symmetry than to its relationship to any substantial protection of federal constitutional rights. Much the same appeal for absolute uniformity in the rules governing search and seizure was rejected by this Court in *Ker v. California*. The reasons compelling rejection of an absolute and uniform rule are much more compelling in regard to a harmless error rule than they were in *Ker* in regard to the rules governing searches and seizure.

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[12]The state constitution was revised by the passage of Proposition 1A on the November, 1966 ballot. *Cal. Const.* art. VI, § 4½ becomes *Cal. Const.* art. VI, § 13. See Assembly Constitutional Amendment 13, Res. Ch. 139, 1966, 1st Ex. Sess.

The main distinction is that the harmless error rule has no direct impact on federal constitutional rights. The rule does not purport to construe the effect or the applicability of such rights. It does not enhance the scope of the rights. It cannot limit the scope of those rights, except to the negative extent envisaged by Chief Justice Traynor in *People v. Parham, supra.* The rule is purely one of judicial administration. It governs the relationship between the trial and the appellate courts.

If the appellate judges of the state, or the federal appellate judges in a circuit court of appeals, used the harmless error rule as a device for deprecating, derogating, or dismissing federal constitutional rights, this Court sits to bring such judges to a halt. That was certainly not done in this case, nor is there any reason to anticipate that it will be done.

Finally, it must be remembered that the harmless error rules of the several states and the United States government were not created as a means of coping with what some persons may view as unnecessary or undesirable federal constitutional rights. The rules preceded the declaration of most of the specific federal constitutional rulings with which we are concerned. Indeed, the roots of the harmless error rule go deep in our legal history. It had its origins in the common law of England[13] and has existed for cen-

[13] See, e.g. *Rex v. Ball,* Russ. & Ry. 132, 168 Eng.Rep. 721 (1807). "Whether the judges on a case reserved would hold a conviction wrong on the ground that some evidence had been improperly received, when other evidence had been properly admitted that was of itself sufficient to support the conviction, the

turies, overshadowed only briefly by the unfortunate but illuminating experiment with the Exchequer or reversible "per se" rule in the Nineteenth Century.[14] The California harmless error rule, and the federal rule, were both the result of the agitation in the early part of this century under distinguished professional sponsorship headed by great legal authorities to undo the so-called "Exchequer rule." The popular dissatisfaction with the reversal of criminal judgments upon the basis of technical rulings required that the confidence of the people be restored in the system of the administration of criminal justice. See *Kotteakos v. United States*, 328 U.S. 750, 758-759 (1946).

The purpose of the rule was set forth by Justice Rutledge, no friend of circumvention of constitutional rights:

> "The general object was simple: To substitute judgment for automatic application of rules; to preserve review as a check upon arbitrary action and essential unfairness in trials, but at the same time to make the process perform that function without giving men fairly convicted the multi-

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Judges seemed to think must depend on the nature of the case and the weight of the evidence. If the case were clearly made out by proper evidence, in such a way as to leave no doubt of the guilt of the prisoner in the mind of any reasonable man, they thought that as there could not be a new trial in felony, such a conviction ought not to be set aside because some other evidence had been given which ought not to have been received. But if the case without such improper evidence were not clearly made out, and the improper evidence might be supposed to have had an effect on the minds of the jury, it would be otherwise." Russ. & Ry. at 133, 168 Eng. Rep. at 721. See generally I Wigmore Evidence § 21 (3d Ed. 1940).

[14] *Crease v. Barrett*, 1 C.M. & R. 933, 149 Eng. Rep. 1353 (Ex. 1835). See generally I Wigmore, *op. cit. supra*, note 13.

plicity of loopholes which any highly rigid and minutely detailed scheme of errors, especially in relation to procedure, will engender and reflect in a printed record." 328 U.S. at 759-760.

Moreover, Justice Rutledge was satisfied that the verbal formula or precise rule was not critical:

> "Easier was the command to make than it has been always to observe. This, in part because it is general; but in part also because the discrimination it requires is one of judgment transcending confinement by formula or precise rule. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 240. That faculty cannot ever be wholly imprisoned in words, much less upon such a criterion as what are only technical, what substantial rights; and what really affects the latter hurtfully. Judgment, the play of impression and conviction along with intelligence, varies with judges and also with circumstance. What may be technical for one is substantial for another; what minor and unimportant in one setting crucial in another." 328 U.S. at 761.

Consequently, we cannot believe that the verbal formula is of constitutional dimensions.

The beginning and the end of the concern of this Court is that federal constitutional rights are protected. Provided that the state standard of harmless error as conceived and as administered accomplishes this purpose, then the state rule should stand regardless of the verbal formula expressed. We submit that the California harmless error rule does meet these standards.

2. A State Harmless Error Rule Is Valid Provided That It Adequately Protects Federal Constitutional Rights and the California Rule Meets That Standard.

The California harmless error rule, as adopted by vote of the people in 1911 and re-adopted by vote of the people on November 8, 1966 as a part of the revision of the California Constitution, reads as follows:

> "No judgment shall be set aside, or new trial granted, in any case, on the ground of misdirection of the jury, or of the improper admission or rejection of evidence, or for any error as to any matter of pleading, or for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." Calif. Const. art. VI, §4½[15].

The authoritative interpretation of this constitutional provision is that stated in *People v. Watson*, 46 Cal.2d 818, 299 P.2d 243 (1956):

> "That a 'miscarriage of justice' should be declared only when the court, 'after an examination of the entire cause, including the evidence,' is of the 'opinion' that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." 46 Cal.2d at 836, 299 P.2d at 254.
>
> "Nevertheless, the test, as stated in any of the several ways, must necessarily be based upon rea-

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[15]The newly adopted *Cal. Const.* art. VI, § 13 substitutes the word "cause" for the word "case" as it appears in *Cal. Const.* art. VI, § 4½. See Assembly Constitutional Amendment 13, Res. Ch. 139, 1966, 1st Ex. Sess.

sonable probabilities rather than upon mere possibilities; otherwise the entire purpose of the constitutional provision would be defeated." 46 Cal.2d at 837, 299 P.2d at 255.

Does this rule adequately protect federal constitutional rights? We submit that it does.

First of all, this rule does not permit the affirmance of a judgment on the ground that there is, apart from the inadmissible evidence, sufficient evidence of guilt to support the conviction. Any notion that the independently sufficient evidence rule is embraced within the California harmless error rule has been set to rest by California case law[16]. It is the duty of the appellate court in California to appraise the effect of the inadmissible evidence upon all of the evidence that was received, bearing in mind the probable impact of the inadmissible evidence on the trier of fact. The many decisions of this Court denouncing the independently sufficient evidence rule, particularly as applied to involuntary confessions, finding its most recent expression in *Miranda v. Arizona*, 384 U.S. 436, at 481 n.52, have no adverse impact on the California harmless error rule.

Where an involuntary confession is concerned the California harmless error rule affirmatively requires, as the decisions of this Court seem to require, reversal

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[16]See, *e.g.*, *People v. Patubo*, 9 Cal.2d 537, 71 P.2d 270 (1937); *People v. Mahoney*, 201 Cal. 618, 258 Pac. 607 (1927); *People v. Geibel*, 93 Cal.App.2d 147, 208 P.2d 743 (1949); *People v. Duvernay*, 43 Cal.App.2d 823, 111 P.2d 659 (1941).

regardless of the other evidence and regardless of the probable effect of the confession. *People v. Dorado, supra; People v. Sears,* 62 Cal.2d 737, 401 P.2d 938 (1965). Cf. *People v. Jacobson,* 63 Cal.2d 319, 405 P.2d 555 (1965), *cert. denied,* 384 U.S. 1015 (1966).

The second area in which it is clear that the protection of federal constitutional rights requires a reversal in all instances is where a defendant has been deprived of a fair trial, that is, where the integrity of the fact-finding process has been impaired by some error in procedure, even though the evidence of guilt may be practically conclusive. The California harmless error rule recognizes the validity and the soundness of this doctrine and has applied it to a variety of situations over the course of many years. *People v. McKay,* 37 Cal.2d 792, 236 P.2d 145 (1951) (unfair pre-trial publicity); *People v. Sarazzawski,* 27 Cal. 2d 7, 161 P.2d 934 (1945) (various errors culminating in denial of a fair trial); *People v. Patubo,* 9 Cal. 2d 537, 71 P.2d 270 (1937) (disparaging comments by trial judge); *People v. Muza,* 178 Cal.App.2d 901, 3 Cal. Rptr. 395 (1960), *cert. den.,* 369 U.S. 839 (1962) (remarks of trial judge); *People v. Duvernay,* 43 Cal.App.2d 823, 111 P.2d 659 (1941) (misconduct of prosecutor).

If two principles can be said to have been incorporated into the harmless error rule as if they were set forth *in haec verba,* it is that a conviction cannot stand if an involuntary confession has been received in evidence or if the defendant has been denied, in any of a variety of ways, a fair trial.

We are startled by the suggestion of petitioner that *People v. Parham, supra,* in applying the harmless error rule to illegally obtained evidence of minor importance, somehow deviated or departed from the decisions holding that denial of a fair trial required reversal (Brief for Petitioner 73). This very Court in *Linkletter v. Walker, supra,* held that the admission of illegally obtained evidence did not impair the integrity of the fact-finding process, or, to put it bluntly, deny the defendant a fair trial. If that is so, then the admission of an item of illegally obtained evidence which is not prejudicial in light of the whole record certainly cannot be said to constitute the denial of a fair trial.

To sum it up, the California harmless error rule does not vest in appellate court judges the power to determine guilt or innocence. Nor does it authorize appellate court judges, once convinced of the guilt of the defendant, to dismiss or disregard errors, either constitutional or statutory. We think that the California harmless error rule, when fairly assessed in light of its administration and application, squares in substance with the construction placed by Justice Rutledge on the federal harmless error rule in *Kotteakos v. United States, supra.*

Justice Rutledge was less concerned with the verbal formulation of the harmless error rule than he was with the principles it expressed governing the review of criminal judgments, principles which are rooted in our legal history. While the federal statute did not draw a parity between criminal and civil cases, nor

change the burden of proof placed upon the prosecution, he was strong in emphasizing that the effect of an error in receiving or excluding evidence had to be weighed carefully in light of the other evidence.

He emphasized that it was not the duty of the appellate court to determine guilt or innocence, nor to speculate upon probable reconviction and decide according to how the speculation might come out. But he was careful to point out that this did not mean that the appellate court must ignore the outcome:

> "But this does not mean that the appellate court can escape altogether taking account of the outcome. To weigh the error's effect against the entire setting of the record without relation to the verdict or judgment would be almost to work in a vacuum. Cf. *United States v. Socony-Vacuum Oil Co., supra,* at 239, 242. In criminal causes that outcome is conviction. This is different, or may be, from guilt in fact. It is guilt in law, established by the judgment of laymen. And the question is, not were they right in their judgment, regardless of the error or its effect upon the verdict. It is rather what effect the error had or reasonably may be taken to have had upon the jury's decision. The crucial thing is the impact of the thing done wrong on the minds of other men, not on one's own, in the total setting. Cf. *United States v. Socony-Vacuum Oil Co., supra,* at 239, 242; *Bollenbach v. United States, supra,* 614.
>
> "This must take account of what the error meant to them, not singled out and standing alone, but in relation to all else that happened. And one must judge others' reactions not by his

> own, but with allowance for how others might react and not be regarded generally as acting without reason. This is the important difference, but one easy to ignore when the sense of guilt comes strongly from the record." 328 U.S. at 764.

Justice Rutledge sums it up in the following sentence:

> "If, when all is said and done, the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand, except perhaps where the departure is from a constitutional norm or a specific command of Congress." 328 U.S. at 764-765[17].

While there may be some difference in emphasis between the California harmless error rule and the federal rule as enacted by Congress and interpreted in *Kotteakos*, we are satisfied that the difference is solely in emphasis and in language and does not go to the substantial question of the protection of constitutional rights. Indeed the California rule stands on a parity with the federal decisions and affirmatively protects federal constitutional rights by requiring reversal where the denial has an effect of inherent prejudice, as with coerced confessions, or where the denial results in the denial of a fair trial.

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[17]That the Justice refers here solely to involuntary statements is made clear by his footnote:

> [19]Thus, when forced confessions have been received, reversals have followed although on other evidence guilt might be taken to be clear. See *Malinski v. New York*, 324 U.S. 401, 404; *Lyons v. Oklahoma*, 322 U.S. 596, 597 n. 1; *Bram v. United States*, 168 U.S. 532, 540-542; *United States v. Mitchell*, 137 F.2d 1006, dissenting opinion at 1012.

We cannot believe that constitutional validity hinges on the use of the word "possible" rather than "probable." If the validity of a rule of judicial administration enacted twice in this century by the people of California rests on a distinction of this kind, then we can expect a renewal of the concern expressed in the early part of this century over the technical splitting of hairs in the administration of criminal justice.

3. Since Ker v. California Permits the States to Develop Workable Rules Governing Search and Seizure Subject Directly to and Indeed Carrying Out the Fourth Amendment, Then the Long Established State Harmless Error Rules, Which Do Not Bear Directly Upon Any Provision of the United States Constitution, Should Be Sustained.

In *Ker v. California, supra,* this Court upheld the development by the states of rules governing arrests, searches and seizures to meet the practical demands of effective criminal investigation and law enforcement. The Court imposed two conditions. First, that the rules themselves not violate the command of the Fourth Amendment prohibiting unreasonable searches and seizures. Secondly, that evidence seized in violation of the constitutional standards be inadmissible on objection of one who has standing to complain.

> "Such a standard implies no derogation of uniformity in applying federal constitutional guarantees but is only a recognition that conditions and circumstances vary just as do investigative and enforcement techniques." 374 U.S. at 34.

This recognition of the power of the states to develop independent standards directly bearing on the

Fourth Amendment gives strong support to a recognition of the power of the states to regulate the administration of their own courts and the power of Congress to regulate the administration of the federal courts. Here there is no direct relation to any federal constitutional guarantees nor any attempt to water down or expand upon those guarantees.

Here there is only an attempt, and a successful attempt, to allay the distrust of the people in the administration of justice and to prevent unnecessary and unwarranted retrials. So long as the state standard adequately protects federal constitutional rights, we can perceive no federal constitutional objection to it, however it may be formulated.

4. If the California Harmless Error Rule Is Valid, Then the Reliance by the State Appellate Court Upon That Rule in Deciding This Case Constitutes an Independent and Adequate State Ground for Decision, Thus Barring Review on the Question of the Correctness of the Application of the Rule.

If a state appellate court may properly apply the state harmless error rule to the question of whether a defendant has been prejudiced by the use of illegally obtained evidence at his trial, provided that the state standard of harmless error is valid under the federal constitution, then the question of whether the state standard has been correctly applied is purely one of state law and not reviewable by the United States Supreme Court. Thus, the California District Court of Appeal, in determining that the illegally obtained evidence that had been used in Cooper's trial did not prejudice him, was basing its decision upon an adequate and independent state ground.

It is clear that this Court will not review such state court judgments.

> "It is a familiar principle that this Court will decline to review state court judgments which rest on independent and adequate state grounds, notwithstanding the co-presence of federal grounds. See, *e.g.*, *NAACP v. Alabama, ex rel. Patterson*, 357 U.S. 449; *Fox Film Corp. v. Muller*, 296 U.S. 207." *Fay v. Noia*, 372 U.S. 391, at 428 (1963); *Durley v. Mayo*, 351 U.S. 277 (1956); *Buck v. California*, 343 U.S. 99 (1952); *Minnesota v. National Tea Co.*, 309 U.S. 551 (1940); *Murdock v. Memphis*, 20 Wall. 590 (1875).[18]

The reasons for the rule have been stated as follows:

> "The reason [for the adequate state ground rule] is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between the state and federal judicial systems and in the limitations of our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its

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[18] "We need not decide whether the adequate state-ground rule is constitutionally compelled or merely a matter of the construction of the statutes defining this Court's appellate review. Murdock itself was predicated on statutory construction, and the present statute governing our review of state court decisions, 28 U.S.C. § 1257, limited as it is to "*judgments or decrees* rendered by the highest court of a State in which a decision could be had" (italics supplied), provides ample statutory warrant for our continued adherence to the principles laid down in Murdock.'" *Fay v. Noia*, 372 U.S. 391, 430, n. 40 (1963).

views of federal laws, our review could amount to nothing more than an advisory opinion." *Herb v. Pitcairn*, 324 U.S. 117, 125-126 (1945).

We must distinguish at this point between the validity of the harmless error standard itself, which we concede raises a federal question, and the correctness of the application of that state standard, which we submit is not a federal question at all and is indeed an adequate and independent state ground of decision.[19] The judgment here rests, not on the decision as to the legality of the search or the scope of the Fourth Amendment or the rights incident thereto, but purely upon the effect of that evidence—no matter what the reason for its inadmissibility—upon the course of the proceedings and the result of those proceedings. The same rule, the state harmless error rule, is applied to non-federal questions of evidence and procedure and applied uniformly and fairly.

Consequently, the application of the harmless error standard does not run afoul of the reasons which have sometimes motivated this Court in refusing to consider a state ground adequate and independent.

"But where the non-federal ground is so interwoven with the other as not to be an independent matter, or is not of sufficient breadth to sustain the judgment without any decision of the other,

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[19]We are not unaware of this Court's refusal, in *Napue v. Illinois*, 360 U.S. 264, 271-72 (1959), to be bound by the state court's determination that the prosecutor's knowing use of perjured testimony had no effect on the outcome of the trial. But the harmless error rule applied by that state court was constitutionally defective, since it did not require reversal for an error which necessarily denied the accused a fair trial.

our jurisdiction is plain." *Abie State Bank v. Bryan*, 282 U.S. 765, 773 (1931), quoting from *Enterprise Irrig. Dist. v. Farmers Mut. Canal Co.*, 343 U.S. 157, 164 (1917).

Here, the non-federal ground is not interwoven with the federal ground whatever. The question of the effect of the evidence upon the outcome has nothing whatever to do with the question of the admissibility of the evidence in light of the reasonableness of the search.

Moreover, it is clear that the state ground—the harmless error rule—is of sufficient breadth to sustain the judgment without any decision of the federal ground, that is, the admissibility of the evidence. Indeed, it is common practice in many appellate courts to decline to review the question of admissibility when it is plain that the error, if any, did not prejudice the defendant.[20]

The only conceivable basis that we can imagine for deeming the application of the harmless error rule to constitute a federal question is that the application of the rule may impair the deterrent effect of the exclusionary rule itself. We are satisfied that we have demonstrated above that there is no foundation whatever to this belief.

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[20]See, *e.g.*, *Hernandez v. United States*, 353 F.2d 624 (9th Cir. 1965); *United States v. McCall*, 291 F.2d 859 (2d Cir. 1961); *United States v. Peres*, 242 F.2d 867 (2d Cir.), *cert. denied*, 354 U.S. 941 (1957); *United States v. H.J.K. Theatre Corp.*, 236 F.2d 502 (2d Cir. 1956), *cert. denied*, 352 U.S. 969 (1957); *Rogers v. United States*, 128 F.2d 973 (5th Cir. 1942); *State v. Stevens*, 41 Wash.2d 694, 251 P.2d 163 (1953); *Pulaski v. State*, 24 Wis.2d 450, 129 N.W.2d 204 (1964).

Finally, we must allude again to the opinion of Mr. Justice Harlan, joined in by three other justices of this Court:

> "Evidentiary questions of this sort are not a proper part of this Court's business, particularly in cases coming here from state courts over which this Court possesses no supervisory power." *Fahy v. Connecticut, supra,* at 92 (dissenting opinion).

By the same token, the application of the federal harmless error rule by the intermediate federal appellate courts does involve a federal question by reason of this Court's supervisory power over the lower federal courts and the power of this Court to construe the federal harmless error statute and insure its correct application. This Court has never assumed to itself such supervisory authority over the state courts, nor can we imagine any reason why the federal harmless error statute should be imposed upon the state courts, nor do we believe that it was ever the intent of Congress that it be so imposed.

It is true that the California District Court of Appeal alluded to the standard stated in *Fahy v. Connecticut* in resolving the question of harmless error. We do not consider this as controlling.

The California District Court of Appeal reached the conclusion that ". . . such error was not sufficiently prejudicial under either test of prejudice urged by the defendant." (R. 269). The "either test" refers to the California harmless error rule as enunciated in *People v. Watson, supra,* and the standard stated in *Fahy v. Connecticut, supra.* Admittedly, the

California court did discuss the *Fahy* standard and concluded that petitioner was not prejudiced under this test.

In *Department of Mental Hygiene of California v. Kirchner,* 380 U.S. 194 (1965), this Court clearly stated its position when the decision of a state court involves both state and federal grounds:

> "An examination of the opinion of the California Supreme Court in the case before us does not indicate whether that court relied on the State Constitution alone, the Federal Constitution alone, or both; and we would have jurisdiction to review only if the federal ground had been the *sole* basis for the decision, or the State Constitution was interpreted under what the state court deemed the compulsion of the Federal Constitution." *Id.* at 198.

From an analysis of the state court opinion, it is clear that the court relied on both upon the California harmless error rule and the *Fahy* standard:

> "We cannot say there has been a miscarriage of justice. (People v. Watson (1956) 46 Cal.2d 818, 836.) Nor, *assuming without deciding that,* as defendant would have it, we are called upon to inquire whether 'there is a reasonable possibility that the evidence complained of might have contributed to the conviction' (Fahy v. Connecticut (1963) 375 U.S. 85, 86-87), are we of the opinion that such reasonable possibility here exists." (R. 270). (Emphasis added.)

Therefore, the federal ground is not the *sole* basis for the decision, nor was the state constitution inter-

preted under what the state court deemed the compulsion of the federal constitution.

Reference to the *Fahy* decision has not been uncommon in recent years in California because the verbal formula expressed in that decision has been urged by counsel for the appellants in many cases. The willingness of the California court to apply the *Fahy* test at the behest of the defendant should not bar this Court from clearly deciding the validity of the California harmless error rule and setting forth the proposition that the correctness of the application of that rule is a matter for the state courts to determine.

5. If the State Harmless Error Rule Is Valid, Then a Decision Based Upon That Ground Should Be Respected in Federal Habeas Corpus Proceedings.

Petitioner argues that there should be no double standard of review in illegal evidence cases, one for the state courts and the other for the federal courts (Brief for the Petitioner 38). As a matter of fact, there are different standards. The federal appellate courts apply the federal harmless error rule as enacted by Congress, and the majority of the federal appellate courts apply that rule to illegally obtained evidence cases. The California appellate courts, as they are required to do, apply the rule adopted by the people of California. Other states presumably apply their own harmless error rules as enacted by their own state legislatures or by judicial decision. The thrust of appellant's argument seems to be not that there should be a uniform standard but that there

should be no standard whatever, that is, any "unconstitutional error" should amount to prejudicial error per se and require an immediate reversal without regard to examination of the record. Moreover, he suggests that the same rule should be applied by federal habeas courts when detention under a state court judgment is attacked (Brief for the Petitioner 40).

There is no doubt that petitioner's solution to the problem would simplify matters a great deal. Show that some item of evidence, no matter how insignificant, should have been excluded under the search and seizure rules and you have instant reversal or instant habeas corpus. But the simplest answer is not necessarily the best, nor does it comport with the needs of our federal system.

If the California harmless error rule is valid, then we submit that the judgment should be affirmed and, by the same token, the state prisoner should not be able to seek relief in federal habeas corpus. This may not be the time or the place to decide the habeas corpus question. But at least two things should be noted.

First of all, the decision of this Court in *Fay v. Noia*, 372 U.S. 391 (1963), does not foreclose a rule which would give respect to the state harmless error rule. The Court carefully limited its ruling in *Fay v. Noia* to the effect of procedural default which, in the view of the Court, amounted to a doctrine of forfeitures.

> "A practical appraisal of the state interest here involved plainly does not justify the federal

courts' enforcing on habeas corpus a doctrine of forfeitures under the guise of applying the adequate state-ground rule." 372 U.S. at 433.

The Court carefully circumscribed its holding:

"For these several reasons we reject as unsound in principle, as well as not supported by authority, the suggestion that the federal courts are without power to grant habeas relief to an applicant whose federal claims would not be heard on direct review in this Court because of a procedural default furnishing an adequate and independent ground of state decision." 372 U.S. at 434.

We are not concerned here with procedural defaults, forfeitures, or the like. We are concerned with the integrity of a valid state law governing the administration of the courts. The controlling law is state law. Contrast *Fay v. Noia:*

"In Noia's case the only relevant substantive law is federal—the Fourteenth Amendment. State law appears only in the procedural framework for adjudicating the substantive federal question. The paramount interest is federal." 372 U.S. at 431.

When the federal right has been recognized, and indeed the search held unreasonable and the products of the search held inadmissible, the validity of the conviction and the continued confinement depends on the state law determination that the defendant was not prejudiced by the evidence. The only relevant substantive law is state. The paramount interest is state.

It would be anomalous to permit or authorize a federal district judge to resolve the question of harmless error, when that question has been passed on by state appellate courts. The question is peculiarly one for the appellate courts, as recognized in the *Kotteakos* opinion. It is doubtful that any remnants of the integrity of the state administration of criminal justice could remain if the question of harmless error were to be pressed, not only to the various levels of state appellate courts, but through the federal district court, the circuit court of appeals, and finally to this Court. We submit that this Court should evince its confidence in the integrity of state court judges and leave to those judges the responsibility of determining what is peculiarly within their area of competence, that is, the effect upon the outcome of the trial of a given error, even when that error involves illegally obtained evidence.

C. The Inadmissible Evidence Did Not Prejudice the Petitioner.

In attempting to show that the admission into evidence of the scrap of brown paper[21] could have contributed to the conviction, petitioner lists a number of "weaknesses" he claims to find in the prosecution's case.

Before considering these claims, let us examine the essential evidence, apart from the scrap of paper, adduced by the prosecution.

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[21] Petitioner does not here complain of the introduction of a single marijuana seed taken from his automobile in a subsequent search. Whatever probative value this seed might have in a prosecution for possession or sale of marijuana, it had none whatever in the instant case, where petitioner was charged with sale of heroin. The trial court said as much when admitting it (R. 102).

The testimony of the investigating officers—local, state and federal—showed that Green, the informant, was thoroughly searched (R. 45, 46, 58, 77). He then accompanied one of the officers to a telephone booth, where he dialed the number of the house where petitioner was living (R. 47, 73). An officer listened to the ensuing conversation with a twin phone (R. 47). A woman answered the telephone and Green asked for "Joe." When "Joe" answered, Green arranged to meet "Joe" right away at Newell's Market for the purpose of buying heroin. The officer recognized "Joe's" voice as that of petitioner (R. 49). Shortly thereafter, officers who were keeping petitioner's house under surveillance saw a person who fit the description of petitioner leave the house, walk to a blue 1957 Oldsmobile parked in front, open the trunk, stand by the trunk for some minutes, and then enter the car and drive off in the direction of Newell's Market (R. 180).

Meanwhile, Green and the officers had stationed themselves near Newell's Market (R. 51). Agent Armenta saw Cooper drive his blue Oldsmobile into the parking lot. He positively identified petitioner as the driver (R. 53). Green went on foot to the parking area and was seen to converse with the driver of a blue 1957 Oldsmobile, who appeared to be petitioner (R. 84). After a few minutes, Green left the parking area and went back to where the officers were standing. He turned over two bindles of heroin (R. 54, 157, 158, 161-62). Green was under surveillance at all times, as was the driver of the Oldsmobile from the

time he entered the parking area. Green was thereafter thoroughly searched again.

The agents who had observed petitioner leave his house drove to the market area. One of them testified that he saw Green in the parking lot leaving the same car and driver which he saw depart from Cooper's residence (R. 189).

These facts conclusively show guilt. The searches demonstrate that Green had no heroin before contacting the driver of the Oldsmobile, and had none after he had turned the two bindles over to the officers. Petitioner's voice was positively identified at the time the meeting was arranged by telephone. Petitioner was positively identified as the driver of a blue 1957 Oldsmobile which entered the parking area of Newell's Market. Green was seen to converse with the driver of such an automobile, who appeared to be the petitioner. Green was constantly under surveillance, and had no opportunity to procure heroin other than from the driver of that vehicle.

The petitioner is, as might be expected, critical of most of this evidence. He makes much of the fact that the prosecution did not produce the informer as a witness at the trial. But he also claims that the informer was an unreliable and untrustworthy witness. For what he was worth, he was as available to the defense as to the prosecution (R. 208). And everything material to which he could have testified was proved by the testimony of other witnesses. There was no reason for the prosecution to call him.

Petitioner claims that the marked money given to the informant for the buy was never found on the petitioner. But he does not point out that he was not arrested for more than two hours after the sale so that he had ample time to rid himself of the twenty dollars (R. 158-59).

While Agent Armenta may not have kept the informer in his view at all times, the group of agents had him under continual surveillance during the critical period when he left the car and contacted Cooper. Petitioner notes a conflict between the testimony of Agent Groom and that of Lieutenant Sullivan over whether the informer actually entered petitioner's car. But there is no conflict over the identity of the driver of that car—Joe Cooper.

The District Court of Appeal disagreed with petitioner:

> "Here the evidence . . . establishes the sale by sufficient circumstantial evidence based upon an adequate presale search of the informant followed by a continuous visual observation of him by the officers as a group between the time of said presale search and the time of the ultimate delivery of the heroin by him to the officers after the sale, thereby eliminating any 'gap' in the surveillance and any claim of his contact with any person other than defendant. . . . This chain of circumstances has its own factual integrity. It effectively linked defendant to the heroin admitted in evidence and did not require as one of its links the brown piece of paper here in dispute." (R. 270).

Petitioner contends, however, that the foregoing facts amount to such a weak case that the trial court might have found it necessary to rely for its conclusion on the admission of a scrap of brown paper taken from petitioner's automobile. This scrap of paper was a torn piece of grocery sack. It was established that the bindles which Green turned over to the officers were wrapped in brown grocer-sack paper.

The probative value of this scrap of paper, in the view of the District Court of Appeal, was dubious at best:

> "Indeed, in the light of the entire record, including the compelling characteristics of the sale and presale search, we are at a loss to understand what actual probative value this piece of an ordinary paper bag could possibly have, there being no testimony establishing that it was a piece of the same paper in which the heroin was wrapped." (R. 270.)

Moreover, insofar as Cooper's possession of brown paper in the car tended to prove that he was the person who delivered heroin in brown paper to Green, the scrap of brown paper found in the car was only cumulative of competent evidence already in the record. At the time of his arrest, Cooper swallowed an object wrapped in brown paper (R. 90, 100, 114).

The introduction of the scrap of brown paper found in the car proved to be a mistake, but it was a good-faith mistake, based on the law as it stood at the time of the trial. Had the prosecutor even suspected that the search which produced the scrap of paper would

prove, through a change in the law, to have been illegal, it is inconceivable that he would have jeopardized his entire case by introducing this minor and cumulative piece of evidence.

Contrast the role of this scrap of paper with that of the illegally seized evidence in *Fahy v. Connecticut*, 375 U.S. 85 (1963). In that case, petitioner had been convicted of painting swastikas on a synagogue. The paint and brush used for this purpose had been illegally seized. This Court's holding that the use of this evidence necessarily prejudiced petitioner was based on five factors, none of which is present in the instant case:

(a) "[T]he tangible evidence of the paint and brush was itself incriminating." *Id.* at 88. The paint and brush were the very instrumentalities with which the crime was committed. As such, they were as incriminating as would be the murder weapon in a trial for that crime. By contrast, the scrap of paper here was not involved in the commission of the crime and was utterly innocuous in itself.

(b) The paint and brush were used to corroborate the testimony of an officer in placing Fahy near the scene of the crime. The piece of paper in the instant case, however, has no corroborative value in placing petitioner at the scene.

(c) The evidence in *Fahy* served as the basis for an opinion that the paint and brush matched the markings on the synagogue. In our case, as petitioner points out, there was no testimony that the paper

found was of the same kind as that used to wrap the bindles.

(d) There was a strong possibility in *Fahy* that the police used the paint and brush to induce petitioner's confession. In the instant case, we have no confession.

(e) The introduction in evidence of the paint and brush may have induced petitioner to take the stand and admit commission of the acts charged, basing his defense on the proposition that those acts did not constitute an offense. In the present case, petitioner took the stand and denied guilt.

A most important factor in *Fahy* was that the trial court, sitting without a jury, made four separate findings of fact (Nos. 8, 13, 14, 15) in which the paint and brush were mentioned. Record, p. 12, *Fahy v. Connecticut*, 375 U.S. 85 (1963). These negative the idea that the court was not fully aware of the illegally seized evidence, and tend to show that such evidence was relied on.[22]

In the instant case, however, we have a clear indication that the trial court, sitting without a jury, did

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[22] "To show prejudice in cases tried before a judge, [in federal courts] the appellant must affirmatively establish first that the trial court considered the inadmissible evidence in reaching his decision. Once having done so, he must shoulder the standard burden of showing that the evidence, so considered, affected the result. . . . The trial judge may have indicated his reliance upon the evidence during the trial or in an oral opinion. The judge's findings and written opinion, if any, are other sources for the appellant." Gibbs, *Prejudicial Error: Admissions and Exclusions of Evidence in the Federal Courts*, 3 Vill. L. Rev. 48, 68-69 (1957) (footnotes omitted).

not rely on the scrap of paper in question. In denying a motion to dismiss at the close of the prosecution's evidence, the court observed:

> "Actually, I see no reason, Mr. Moran, to disbelieve at this point the basic testimony of the officers. I have no doubt that the defendant was out there. I have no doubt that Green was out there. I have no doubt that the contact was made. The two bindles are here. Agent Lee says they were turned over to him by Mr. Green after the contact." (R. 208).

Again, in announcing his conclusion, the court said:

> "Well, gentlemen, there's no reasonable doubt, or otherwise in my mind, that the phone call was placed as testified and that the officers were outside the defendant's aunt's home; that he answered the phone there; that he did go over to Newell's Market and was identified there and met Mr. Green and Mr. Green thereafter did turn over the bindles in evidence to Agent Lee and they were found to be heroin. And the Court will find the defendant guilty as charged . . . ." (R. 242).

The court's emphasis, in these statements, on the events of the day of arrest, as related by the officers, and the reference to the bindles, make it abundantly clear that the court did not give any weight to the scrap of paper, and may even have overlooked it.

Accepting petitioner's contention that no distinction should be made between court trials and jury trials, it is nonetheless true that where an appellate court can ascertain from the remarks of the sole trier

of fact that the error complained of did not contribute to the conviction, reversal is not warranted.

It is submitted that there is no reasonable possibility that the error in admitting the scrap of brown paper might have contributed to the conviction. See *Fahy v. Connecticut*, 375 U.S. 85, 86-87 (1963).

II

THE SEARCH OF A VEHICLE PROPERLY SEIZED AND LAWFULLY IN THE CUSTODY OF THE POLICE FROM THE TIME OF SEIZURE IS REASONABLE UNDER THE FOURTH AMENDMENT.

The facts established in the trial court concerning the circumstances of the search are as follows: petitioner was lawfully arrested for the offense of selling narcotics and was immediately taken into custody. At the same time, the arresting officers seized the automobile pursuant to a statutory mandate providing for the seizure and forfeiture of vehicles used in violation of the narcotics laws. The arrest of the petitioner and the seizure of his automobile were clearly lawful and no question has ever been raised as to the lawfulness of the arrest and seizure at any stage of the proceedings. A week after the car was seized an officer searched the petitioner's car and found a small piece of brown paper in the glove compartment. This paper was later introduced into evidence during the petitioner's trial.

The California District Court of Appeal held that a search of petitioner's properly seized and im-

pounded automobile was a violation of his constitutional rights under the Fourth Amendment to the United States Constitution and that the evidence obtained as a result thereof was inadmissible. The court relied solely on the federal Constitution in reaching its determination that the search was unreasonable (R. 263-67).

A. The Search of a Vehicle Properly in the Custody of Law Enforcement Officials From the Time of Seizure Is Not an Unreasonable Search and Seizure Under the Fourth Amendment.

1. The Search of Petitioner's Vehicle Was Reasonable.

The Fourth Amendment prohibits not all searches and seizures but only those which are unreasonable. *Carroll v. United States,* 267 U.S. 132 (1925). The Constitution does not define what are "unreasonable" searches and that definition cannot be made through the application of any fixed formula. *United States v. Rabinowitz,* 339 U.S. 56 (1950). Reasonableness is not a matter of abstract theory but a pragmatic question to be determined in each case in the light of its own facts and circumstances. *Go-Bart Importing Company v. United States,* 282 U.S. 344 (1931). The constitutional reasonableness or unreasonableness of a search or seizure should be related not only to the circumstances which occasion the arrest or search but also to the purpose and extent of the interference with liberty represented by the arrest or search. See *Agnello v. United States,* 269 U.S. 20 (1925); *United States v. Lefkowitz,* 285 U.S. 452 (1932). The distinction between a reasonable search and one which is un-

reasonable is to be drawn in each case in a manner which will conserve the public interest as well as the interest and rights of individual citizens. *Carroll v. United States, supra.*

The search and seizure in the instant case, under the totality of circumstances, was reasonable. Where an automobile used by an arrested person in the commission of the crime is properly impounded, officers do not act unreasonably in searching that vehicle or in removing its contents without a warrant.

Although an accused may be arrested many miles from the police station and many hours before his arrival at the station the search of the arrested person at the police station has been invariably upheld as a valid search. *United States v. Caruso,* 358 F.2d 184 (2d Cir. 1966); *Robinson v. United States,* 283 F.2d 508 (D.C.Cir.), *cert. denied,* 364 U.S. 919 (1960); *Whalem v. United States,* 346 F.2d 812 (D.C.Cir.), *cert. denied,* 382 U.S. 862 (1965); *State v. Menard,* 331 S.W.2d 521 (Mo. 1960); *Sheppard v. State,* 394 S.W.2d 624 (Ark. 1965); *People v. Shaw,* 237 Cal. App.2d 606, 47 Cal.Rptr. 96 (1965); *State v. Post,* 255 Ia. 573, 123 N.W.2d 11 (1963); *Commonwealth v. Lawton,* 348 Mass. 129, 202 N.E.2d 824 (1964); *State v. Papitsas,* 80 N.J.Super. 420, 194 A.2d 8 (1963).

In such cases the examination of the suspect's property at the police station has been justified on the ground that it was incidental to a lawful arrest. Thus, in *Baskerville v. United States,* 227 F.2d 454 (10th Cir. 1955), the defendant was arrested by federal authorities and booked at the city jail, at which

time his personal property was placed in an envelope and stored with the jail custodian. It was there held that when federal authorities two weeks after the arrest examined the defendant's property and found a forged identification card, the search was valid as incidental to the arrest.

An examination and search of the property of a suspect at a police station and not at the scene of the arrest and at some time remote from the arrest can hardly be justified under the traditional concept of being incidental to the arrest. Rather, the real justification is that the property is properly in the custody of the authorities and a later search and examination of the property does not further impair the right of privacy.

It is standard practice for police officers to inventory the contents of a vehicle being impounded. This is necessary to protect the vehicle owner, the police, and the owner of the storage facility. The propriety of such an inventory has repeatedly been recognized. *People v. Garcia,* 214 Cal.App.2d 681, 29 Cal.Rptr. 609 (1963); *People v. Myles,* 189 Cal.App.2d 42, 10 Cal.Rptr. 733 (1961), *cert. denied,* 371 U.S. 872 (1962); *People v. Nebbitt,* 183 Cal.App.2d 452, 7 Cal.Rptr. 8 (1960); *People v. Ortiz,* 147 Cal.App.2d 248, 305 P. 2d 145 (1956). Contraband uncovered during an inventory is admissible evidence. *Ibid.* No greater invasion of privacy occurs when an impounded automobile is searched than occurs when a vehicle is inventoried upon impounding. In either case, police officers act reasonably.

When an automobile is in the lawful custody of the police, its contents are also in their possession. Therefore, removal of articles from the vehicle does not constitute a new seizure and cannot violate the proscription against unreasonable seizures. *People v. Odegard*, 203 Cal.App.2d 427, 21 Cal.Rptr. 515 (1962); *People v. Myles, supra; People v. Nebbitt, supra; cf. People v. Jeffries*, 31 Ill.2d 597, 203 N.E.2d 396 (1964).

The overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State. *Schmerber v. California*, 384 U.S. 757, 767 (1966). It strains logic and reason to hold that police officers may seize a murderer's rifle, a burglar's sack, or any other instrumentality of the crime and at the same time hold the officers may not later search the instrumentality of the crime. Were such the law an officer could not later search the rifle for bullets, markings, or fingerprints. Similarly, he could not later search the sack for stolen goods, burglary tools, or other evidence. The privacy of a murderer is not invaded when the weapon in the police locker is later searched; the dignity of the burglar is not intruded upon when the sack in the custody room is later searched. To paraphrase Judge Kaufman in *United States v. Guerra*, 334 F.2d 138, 147 (2d Cir. 1964), *cert. denied*, 379 U.S. 936:

> "If we were mechanically to invoke Massiah [Preston] to reverse this conviction, we would transform a meaningful expression of concern for the rights of the individual into a meaningless mechanism for the obstruction of justice."

In making the determination of what searches are reasonable, this Court must also consider society's interest in continuing to allow such searches. A search and examination of an instrumentality of the crime lawfully in the custody of the police is a traditional and necessary function of effective police investigation. Were this Court to deny enforcement officials the right to gather such evidence from an accused in lawful custody, a necessary weapon in the arsenal of detection would be severely impaired. In recent years this Court has announced constitutional principles that necessarily diminish the use of interrogation and, at the same time, encourage police investigation. *Miranda v. Arizona*, 384 U.S. 436, 477-81 (1966); *Escobedo v. Illinois*, 378 U.S. 478, 492 (1964). As a practical matter, this Court cannot possibly insist that enforcement officials rely upon independent investigation and at the same time deny them an integral aspect of such investigations.

In the instant case there was an offense committed by the petitioner, sale of narcotics, the police properly seized an instrumentality of that crime, the automobile, and thereafter examined the instrumentality for the fruits of that crime. It is unreasonable and illogical to say that when officers lawfully come into the possession of an instrumentality of the crime that they may not later lawfully examine it, unless they secure a search warrant.

2. A Warrant Is Not the Inevitable Prerequisite to a Reasonable Search.

There was sufficient time to secure a warrant prior to searching Cooper's car. The police did not do so. Prior to this Court's decision in *Preston v. United States,* 376 U.S. 364 (1964), there was no reason to regard this as a necessary step. Failure to obtain a warrant should not now be fatal to this search.

Preston held only that once an accused is under arrest and in custody, a warrantless search made at another time or place cannot be justified as incident to the arrest. 376 U.S. 364, 367. *Preston* did not hold unreasonable every warrantless automobile search not brought within a traditional exception to the general rule demanding warrants. "The relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable. That criterion in turn depends upon the facts and circumstances—the total atmosphere of the case." *United States v. Rabinowitz,* 339 U.S. 56, 66 (1950).

Unlike the search in *Preston* or that in *People v. Burke,* 61 Cal.2d 575, 394 P.2d 67 (1964), the search of Cooper's auto is not urged as incident to an arrest. Still, the law surrounding incidental searches is instructive for present purposes.

It is indisputable that the type of search regularly permitted as incident to an arrest bears little correlation to the historical justification for such searches: necessity. An intensive search of an accused's automobile, room, or apartment is commonly made after the accused has been arrested, handcuffed, and per-

haps placed under guard in a police squad car. Almost as frequently these searches are upheld as sufficiently contemporaneous in time and place to warrant the label "incident to arrest." *Cf. United States v. Rabinowitz, supra; Harris v. United States,* 331 U.S. 145 (1947). Often it is obvious that the accused was in no position to exercise control over any weapon, means of escape, or destructible evidence that might lie within the searched premises. And often, where a warrantless search of an automobile is justified by virtue of the great mobility of motor vehicles, it is clear that a police officer could have been stationed at the vehicle until a warrant was obtained.

The explanation for the apparent discrepancy between the reason and the rule here is that the test actually applied in these warrantless search cases is not necessity but reasonableness: did the officers conducting the search act reasonably within the meaning of the Fourth Amendment? This is a proper test, one which should be applied to the search of Cooper's automobile.

Petitioner's constitutional rights under the Fourth Amendment to the Constitution were not violated by the search conducted after both he and the automobile were in custody, in view of the fact that the identical search could have been conducted at the time and place of the seizure of the automobile. As was said by Mr. Chief Justice Vinson in the dissent in *Trupiano v. United States,* 334 U.S. 699, 714 (1948), subsequently overruled by *United States v. Rabinowitz,* 339 U.S. 56 (1950):

"To insist upon the use of a search warrant in situations where the issuance of such a warrant can contribute nothing to the preservation of the rights which the Fourth Amendment was intended to protect, serves only to open an avenue of escape for those guilty of crime and to menace the effective operation of government which is an essential precondition to the existence of all civil liberties." *Id.* at 714-15.

3. This Court Should Limit *Preston* v. United States.

To the extent that *Preston* suggests that every warrantless search of an automobile lawfully in police custody is illegal, it departs from the standard of reasonableness written into our Constitution. We respectfully urge this Court to clarify and limit *Preston v. United States.*

In striving to uphold reasonable searches, courts have been compelled to distinguish *Preston* in numerous and remarkable ways: (1) by the elapsed time between the seizure and the search, *Crawford v. Bannan,* 336 F.2d 505 (6th Cir. 1964), *cert. denied,* 381 U.S. 955 (1965); (2) by finding the searched vehicle to be an instrument of the crime, *Johnson v. State,* 238 Md. 528, 209 A.2d 765 (1965); (3) by the presence of the accused, though in custody, during the search of his automobile at a police station, *Arwine v. Bannan,* 346 F.2d 458 (6th Cir.), *cert. denied,* 382 U.S. 882 (1965); (4) because the search of the vehicle occurred at the scene of arrest, although hours after the accused had been jailed, *State v. Collins,* 270 Minn. 581, 132 N.W.2d 802 (1964); (5) because the

search was more properly related to the basis for arrest than in *Preston*; *State v. Fioravanti*, 46 N.J. 109, 215 A.2d 16 (1965), *cert. denied*, 384 U.S. 919 (1966); (6) because the arrest was made under conditions of bad weather, *State v. McCreary*, 142 N.W.2d 240 (S.D. 1966), or in a hostile neighborhood, *United States ex rel. Montgomery v. Wallack*, 255 F.Supp. 566 (S.D. N.Y. 1966).

On occasion, *Preston* simply has not been followed. *State v. Rowan*, 246 La. 38, 163 So.2d 87 (1964); *People v. Moschita*, 25 App. Div. 2d 686, 269 N.Y.S.2d 70 (1966); *People v. Morgan*, 21 App. Div. 2d 815, 251 N.Y.S.2d 505 (1964), *remanded on other grounds*, 15 N.Y.2d 914, 206 N.E.2d 656, 258 N.Y.S.2d 650 (1965).

Another response has been the development of the "continuous search doctrine." If police officers conduct a cursory examination of the accused's vehicle upon arrest, a subsequent search of greater scope and intensity constitutes part of a single "reasonable search process." *People v. Talbot*, 64 A.C. 751, 769, 414 P.2d 633 (1966). *Accord: Trotter v. Stephens*, 241 F.Supp. 33 (E.D. Ark. 1965); *State v. Fioravanti, supra; State v. Putnam*, 178 Neb. 445, 133 N.W.2d 605 (1965). *Cf. Price v. United States*, 348 F.2d 68 (D.C. Cir.), *cert. denied*, 382 U.S. 888 (1965); *Rodgers v. United States*, 246 F. Supp. 405 (E.D. Mo. 1965); *Johnson v. State*, 238 Md. 528, 209 A.2d 765 (1965). *Cf.* also *State v. Grunau*, 141 N.W.2d 815 (Minn. 1966); *People v. Jeffries*, 31 Ill.2d 597, 203 N.E.2d 398 (1964).

Specific disapproval of *Preston* has not been wanting. *Bowling v. United States,* 350 F.2d 1002, 1005 (D.C. Cir. 1965) (dissent); *State v. Bitz,* 404 P.2d 628, 634 (Idaho 1965) (dissent).

The efforts of federal and state courts alike to avoid the possible impact of *Preston* is evidence of the undesirable effects of that decision. Thus, the state and federal courts uncertain of the effect of *Preston,* have by tenuous reasoning created subtle distinctions to uphold otherwise reasonable searches. If this Court now construes *Preston* to exclude all warrantless searches and seizures "remote in time or place" to the arrest, its effect will be to hold unlawful those searches which, both in logic and reason as well as the purposes and values protected, are patently reasonable under the Fourth Amendment.

B. The Search of a Vehicle Properly Seized and Impounded Pursuant to a Valid Forfeiture Provision Is Reasonable Under the Fourth Amendment.

In *Preston v. United States,* 376 U.S. 364 (1964), this Court held that the search of a car at a police station after the defendant had been arrested and taken into custody was too remote in time and place to have been made as incidental to the arrest. Respondent makes no claim that the search of Cooper's automobile should be considered as incidental to his arrest. Thus, *Preston* is not applicable to the instant case.

Cooper may be further distinguished. In *Preston* the seizure of the suspect's automobile was unrelated to the grounds for arrest. Preston was arrested for vagrancy. In the case of vagrancy, there is no fruit of the crime nor is there any contraband associated with such a violation.[28] After being taken to the station the police searched the car and found masks, pillowslips and other articles which led to a confession of a plan to rob a bank. What was found there connected the suspects with the crime of which they were convicted, conspiracy to commit bank robbery. Clearly, the search was not related to the arrest. By contrast, the seizure of Cooper's automobile was integral with his arrest and in fact compelled by it. Arresting officers knew that Cooper was using the vehicle to transport heroin and they impounded his vehicle pursuant to a statutory mandate. California Health and Safety Code § 11611. Cooper suffered no separate and unnecessary invasion of privacy.

Perhaps *Cooper* differs most significantly from *Preston* in that here authorities acted under an ap-

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[28]An arrest for vagrancy is similar to an arrest for a traffic violation. There are no fruits of speeding or other traffic violations nor is there any contraband associated with such offense. Although an officer may arrest a suspect for a traffic violation, the search of the car cannot be justified on that ground, for it has no relation to the traffic violation and would not be incidental to an arrest therefor. This principle has been recognized by many courts. *Byrd v. State*, 80 So.2d 694 (Fla. 1955); *People v. Zeigler*, 358 Mich. 355, 100 N.W.2d 456 (1960); *United States v. Tate*, 209 F.Supp. 762 (D.Del. 1962); *People v. Mayo*, 19 Ill. 2d 136, 166 N.E.2d 440 (1960); *People v. Blodgett*, 46 Cal.2d 114, 293 P.2d 57 (1956); *People v. Moray*, 222 Cal.App.2d 743, 35 Cal.Rptr. 432 (1963); *Elliot v. State*, 173 Tenn. 203, 116 S.W.2d 1009 (1938).

plicable state forfeiture statute.[24] Searches and seizures of contraband and of vehicles and vessels transporting contraband have been historically distinguished from searches generally.

The reasonableness of a warrantless search of an automobile impounded pursuant to a similar federal statute[25] has been recognized in an impressive line of decisions rendered by the Circuit Courts of Appeals. Such searches were upheld prior to *Preston* by the Fifth Circuit, *Vaccaro v. United States,* 296 F.2d 500 (1961), *cert. denied,* 369 U.S. 890 (1962), and by the Tenth Circuit, *Sirimarco v. United States,* 315 F.2d 699, 701, *cert. denied,* 374 U.S. 807 (1963). Subsequent to the *Preston* decision, similar searches were upheld by the Ninth Circuit, *Burge v. United States,* 342 F.2d 408, *cert. denied,* 382 U.S. 829 (1965), by the Eighth Circuit, *Drummond v. United States,* 350 F.2d 983, 988 (1965), *cert. denied,* 384 U.S. 944 (1966), and by the Seventh Circuit, *United States v. Ziak,* 360 F.2d 850 (1966).

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[24]It should be noted that respondent does not contend that the state forfeiture statute authorizes a search of the vehicle. The District Court of Appeal determined that the state statute did not authorize a search and that court's construction of its own state statute is controlling. *Albertson v. Mallard,* 345 U.S. 242 (1953); *United States v. Burnison,* 339 U.S. 87 (1950). Rather it is respondent's position that where a statute authorizes the seizure and forfeiture of a vehicle the later search of that vehicle cannot be said to be unreasonable within the meaning of the Fourth Amendment. The District Court of Appeal rejected this argument exclusively on federal constitutional grounds referring only to the Amendment and not to its state analogue, Article I, section 19 of the California Constitution.

[25]Title 49, United States Code, section 782, provides that any vessel, vehicle or aircraft used to transport contraband (narcotics, firearms or counterfeit obligations) shall be seized and forfeited.

In *Burge v. United States, supra,* the defendant used his car to transport and sell heroin, and was later arrested for violations of the narcotics law. At the time of his arrest the federal officers seized and impounded his car pursuant to the federal forfeiture statute. One week later, officers searched the vehicle and found marked money secreted in the headlight section of the automobile. In upholding the validity of the search the court held that where the officers who seized the car had probable cause for believing that it had been used for transporting contraband and the car was in the lawful custody of the United States from the time of seizure until the search, the search without a warrant of the seized car was not unreasonable within the meaning of the Fourth Amendment.

California state law requires any state peace officer upon making an arrest for a narcotics violation to seize any vehicle used to unlawfully transport any narcotic. California Health & Safety Code § 11611.[26] In the instant case the officers had probable cause for believing that Cooper's car had been used to transport

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[26]California Health and Safety Code section 11611 provides:

"Any peace officer of this State, upon making or attempting to make an arrest for a violation of this division, shall seize any vehicle used to unlawfully transport any narcotic or to facilitate the unlawful transportation of any narcotic, or in which any narcotic is unlawfully kept, deposited or concealed or which is used to facilitate the unlawful keeping, depositing or concealment of any narcotic, or in which any narcotic is unlawfully possessed by an occupant thereof, or which is used to facilitate the unlawful possession of a narcotic by an occupant thereof, and shall immediately deliver such vehicle to the Division of Narcotic Enforcement of the Department of Justice to be held as evidence until a forfeiture has been declared or a release ordered."

narcotics and thereafter seized the vehicle pursuant to the statutory mandate and kept the vehicle in lawful custody until the search.

A search made reasonable by the presence of the federal forfeiture provisions is no less reasonable where made in conjunction with California's forfeiture statutes. In each case, the officials seized the vehicle pursuant to an express statutory mandate giving the officers power to seize a vehicle because of its illicit use in the transportation of narcotics. In each case there is a minimal invasion of privacy since the vehicle searched already has been seized from the accused and is in police custody.

This is not an area where law enforcement officers may exercise unbridled discretion. The basic decision to invade one's privacy—by the seizure and impounding of his automobile—is made by the legislature, not the police. Under such facts and circumstances, a subsequent search of the seized vehicle does not constitute an unreasonable search and seizure within the meaning of the Fourth Amendment.

III

THE QUESTION OF WHETHER PETITIONER WAS DENIED THE CONSTITUTIONAL RIGHT OF CONFRONTATION IS NEITHER PROPERLY BEFORE THIS COURT, NOR MERITORIOUS.

Petitioner complains that he was denied his constitutional right of confrontation and cross-examination. He bases this on (1) Agent Lee's testimony that the

informant Green told him that "yes," he had the stuff after buying the heroin (R. 157), and (2) the officers' testimony "concerning every pertinent movement of the informer from his arrest to his delivery of heroin to Agent Lee" (Brief for the Petitioner 43). Since the prosecution did not call Green as a witness, petitioner claims he was denied the right of cross-examination inherent in the confrontation clause.

A. The Question of Whether Petitioner Was Denied the Constitutional Right of Confrontation Guaranteed Him by the Sixth Amendment Is Not Properly Before This Court.

In order to exercise orderly and fair certiorari jurisdiction over state court decisions which involve important constitutional questions, Congress and this Court have set forth definite procedural prerequisites of a very firm nature, which requirements the petitioning party must fulfill before this Court will entertain jurisdiction.

Generally speaking, these rules are as follows: (1) the petitioning party must have "seasonably raised [the federal questions] in accordance with the requirements of state law";[27] (2) the petitioning party must have raised the constitutional question with sufficient particularity to have apprised the state court of the problem involved;[28] and (3) petitioner

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[27] *Edelman v. California*, 344 U.S. 357, 358 (1953); *accord*, *Louisville and Nashville Railway v. Woodford*, 234 U.S. 46, 51 (1913); *Hulbert v. City of Chicago*, 202 U.S. 275 (1906); *Parker v. Illinois*, 333 U.S. 571 (1947); *Pennsylvania R.R. v. Illinois Brick Co.*, 297 U.S. 447, 463 (1936); *Hartford Life Ins. Co. v. Johnson*, 249 U.S. 490, 493 (1918).

[28] *Oxley Stave Co. v. Butler County*, 166 U.S. 648, 655 (1896).

must have pursued the constitutional issue through to a decision thereon by the highest state court.[29]

Because certiorari is at all times discretionary,[30] where it becomes apparent that petitioner has failed to comply with these fundamental conditions precedent this Court should dismiss its writ of certiorari as having been improvidently granted.[31]

In the instant case, the so-called confrontation issue was never presented to or passed on by the "highest" state court because petitioner neglected to pose the constitutional issue until his petition for hearing in the California Supreme Court,[32] and that court de-

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[29]28 U.S.C. § 1257 provides: "Final judgments or decrees rendered by the highest court of a state in which a decision could be had may be reviewed by the Supreme Court as follows . . . (3) by writ of certiorari . . . where any title, right, privilege or immunity is specially set up or claimed under the Constitution. . . ."

"It must affirmatively appear on the face of the record that a federal question constituting an appropriate ground for such review was presented in and expressly or necessarily decided, by such state court." *Whitney v. California*, 274 U.S. 357, 360 (1927); *accord, Honeyman v. Hanan*, 300 U.S. 14, 18 (1937); *Lynch v. New York*, 293 U.S. 52, 54 (1934); *Durley v. Mayo*, 351 U.S. 277, 281 (1955).

[30]*Hammerstein v. Superior Court*, 341 U.S. 491, *rehearing denied*, 342 U.S. 843 (1951).

[31]"Where the highest court of the state delivers no opinion and it appears that the judgment *might* have rested upon a non-federal ground, this Court will not take jurisdiction to review the judgment." *Stembridge v. Georgia*, 343 U.S. 541, 547 (1952); see also *Lynch v. New York*, 293 U.S. 52, 54-55 (1934); *Durley v. Mayo*, 351 U.S. 277, 281 (1956); *Newsom v. Smith*, 365 U.S. 604 (1961); and *Mishkin v. State of New York*, 383 U.S. 502, 512-514 (1966).

[32]The only objection at trial made by petitioner which had anything to do with the informant Green was a motion for dismissal on the basis of insufficient evidence. See R. 206-208. He did not pursue this issue on appeal nor did he raise any other related problems until his petition for hearing in the California Supreme Court. See Brief for the Petitioner 47, 48.

nied hearing the appeal without opinion.[33] The issue was never presented to the District Court of Appeal which was the "highest state court" for this purpose. Where the highest state court has discretionary review and declines to exercise its authority, the judgment of the intermediate court rather than the order of refusal by the higher court is the judgment reviewable under section 1257.[34]

Moreover, California adheres to the rule requiring an objection at trial before an issue involving the admissibility of evidence can be considered on appeal.[35] The sufficiency of this failure to object at the trial level as an independent and adequate state ground, particularly with reference to the confrontation clause, is well noted in this Court's decision in *Douglas v. Alabama,* 380 U.S. 415 (1965), the companion case to *Pointer v. Texas,* 380 U.S. 400 (1965). Therein, this Court stated, "In determining the sufficiency of objections we have applied the general principle that an objection which is ample and timely to bring the alleged federal error to the attention of the trial court and enable it to take appro-

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[33] *People v. Cooper,* 1 Crim. 4233, California Supreme Court, July 21, 1965. See R. 276.

[34] *Sullivan v. Texas,* 207 U.S. 416 (1907); *American Ry. Exp. Co. v. Levee,* 263 U.S. 19, 20-21 (1923); *Hammerstien v. Superior Court,* 341 U.S. 491, 492 (1951); *Michigan Wisconsin Pipe Line Co. v. Calvert,* 347 U.S. 157, 160 (1953); *Ellis v. Dixon,* 349 U.S. 458 (1954).

[35] *People v. Richardson,* 51 Cal.2d 445, 447, 334 P.2d 573, 575 (1959); *People v. Hyde,* 51 Cal.2d 152, 157, 331 P.2d 42, 44-45 (1958); *In re Lessard,* 62 Cal.2d 497, 503, 399 P.2d 39, 43 (1965). California follows the same rule with respect to the production of witnesses. *People v. Velis,* 172 Cal.App.2d 470, 473, 342 P.2d 392, 394-395 (1959).

priate corrective action is sufficient to serve legitimate state interests, and therefore sufficient to preserve the claim for review here." *Douglas v. Alabama, supra,* at 422.

Accordingly, this Court has consistently held that failure to present the issue in conformance with established state procedural requirements, such that the court below could not or did not consider the issue, furnishes independent and adequate state grounds for their decision, thereby precluding review here.[36]

Petitioner endeavors to obviate this fundamental defect by claiming that he was unaware the right existed until a time when the only remedial course open to him was a petition for hearing in the California Supreme Court.[37] However, *Pointer v. Texas, supra,* was decided by this Court on April 5, 1965, some seven weeks prior to the District Court of Appeal's decision in this case, and ten weeks previous to the time at which petitioner claims he actually became aware thereof.[38]

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[36] *Edelman v. California,* 344 U.S. 357 (1953); *Louisville and Nashville Railway v. Woodford,* 234 U.S. 46 (1913); *Hulbert v. City of Chicago,* 202 U.S. 275 (1906); *Mutual Life Ins. Co. v. McGrew,* 188 U.S. 291 (1902); *Pennsylvania R.R. v. Illinois Brick Co.,* 297 U.S. 447 (1935); *Wolfe v. North Carolina,* 364 U.S. 177 (1960); *Hartford Life Ins. Co. v. Johnson,* 249 U.S. 490 (1918); *John v. Paullin,* 231 U.S. 583 (1913); *Stembridge v. Georgia,* 343 U.S. 541 (1952); *Newsom v. Smith,* 365 U.S. 604 (1961); *Durley v. Mayo,* 351 U.S. 277 (1956).

[37] See Brief for the Petitioner 49-50.

[38] The District Court of Appeal handed down its decision on May 24, 1965, and petitioner alleges that he did not become aware of *Pointer v. Texas* until June 15, 1965. See Brief for the Petitioner 49.

Petitioner's lack of awareness is no excuse. He should have filed with the lower court a supplemental brief on the issue or at the very least have made a timely petition for rehearing, both of which avenues were clearly open to him.[39] His failure to do so provides ample justification for this Court to decline review of the matter.

Aside from his failure to timely raise the issue, petitioner's argument that he is excused from complying with the above requirements because of the unforeseeable change in the applicable law is without merit. The authority upon which he relies only but recites the well known exception to the general rule requiring a timely raising of the constitutional question, where, such a position would have been futile under the law operative at that time, but which law was suddenly and unexpectedly changed prior to the time of final judgment.[40] However, this authority is not pertinent to the instant case. Petitioner cannot claim the unreasonable burden of clairvoyance with respect to the right established in *Pointer v. Texas.*

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[39]If *Pointer v. Texas* was crucial to petitioner's case because it profoundly altered the applicable law as much as petitioner now contends, then petitioner's argument that a petition for rehearing in the District Court of Appeal would have been futile (because that court followed a contrary rule), appears wholly illogical in light of the fact that *Pointer* was clearly binding upon that court by virtue of the precise holding therein, i.e., that the Sixth Amendment right of confrontation was binding upon the states. Such a contention is unjustly attributing gross incompetence to a most highly respected court.

[40]Petitioner relies on *Missouri ex rel. Missouri Ins. Co. v. Gehner,* 281 U.S. 312 (1930); *Brinkerhoff-Faris Trust & Sav. Co. v. Hill,* 281 U.S. 673 (1930); and *Great Northern Rwy. Co. v. Sunburst Oil and Refining Co.,* 287 U.S. 348 (1932).

In California, the right of confrontation was definitely established, known, and well recognized for many years prior to this Court's decision in *Pointer*.[41] The California standard was no less stringent than that adopted in *Pointer*, nor was it any less respected.[42] Thus, in so far as it promulgated hitherto

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[41]Article I, section 13, clause 8 of the California Constitution provides that in criminal cases, "The legislature shall have power to provide for the taking, in the presence of the party accused and his counsel, of depositions of witnesses in criminal cases, other than cases of homicide when there is reason to believe that the witness, from inability or other cause, will not attend at the trial."

Accordingly, in 1872, the California Legislature enacted such a provision. As amended in 1911, it reads as follows: "In a criminal action the defendant is entitled . . . (3) To produce witnesses in his behalf and to be confronted with the witnesses against him, in the presence of the Court, except that . . . where the testimony of a witness on the part of the people, who is unable to give security for his appearance, has been taken conditionally in the like manner in the presence of the defendant, who has, either in person or by counsel, cross-examined or had the opportunity to cross-examine the witness, the deposition of such witness may be read, upon its being satisfactorily shown to the court that he is dead or insane, or cannot with due diligence be found within the State. . . ." California Penal Code § 686. See *e.g.*, *People v. Ashley*, 42 Cal.2d 246, 272, 267 P.2d 271, 287, *cert. denied*, 348 U.S. 900 (1954); *People v. Redston*, 139 Cal.App.2d 485, 293 P.2d 880, 885-87 (1956); *People v. Fisher*, 208 Cal.App.2d 78, 25 Cal. Rptr. 242 (1962); *People v. Kiihoa*, 53 Cal.2d 748, 752, 349 P.2d 673, 675 (1960); *People v. Hanz*, 170 Cal.App.2d 793, 799, 12 Cal. Rptr. 282, 285 (1961), *cert. denied*, 368 U.S. 969 (1962); *People v. Noone*, 132 Cal.App. 89, 22 P.2d 284 (1933); *People v. Barnett*, 77 Cal.App.2d 299, 175 P.2d 237 (1947); *People v. McKoy*, 193 Cal.App.2d 104, 13 Cal. Rptr. 809, *cert. denied*, 369 U.S. 824 (1961); *People v. Terry*, 180 Cal.App.2d 48, 52-53, 4 Cal. Rptr. 597, 600-603 (1960), *cert. denied*, 364 U.S. 941 (1961); *People v. Raffington*, 98 Cal.App.2d 455, 458, 220 P.2d 967, 970 (1950), *cert. denied*, 340 U.S. 912 (1951).

[42]Nor is *Pointer v. Texas, supra*, any stricter than the California rule because it requires an effective cross-examination, thus implying the necessity for counsel at the preliminary hearing. Under California law, the accused has the right to counsel at the preliminary hearing. See California Penal Code section 858 and *People v. Williams*, 124 Cal.App.2d 32, 268 P.2d 156 (1954).

unforeseeable legal rights, *Pointer* had absolutely no effect on California law. It only made constitutionally binding upon the California courts a rule which this same judiciary had already been adhering to for quite some time.

Apparently, it is petitioner's answer that the right "was only statutory."[48] Respondent perceives no merit in this distinction. Whether constitutional or statutory, it is the right's establishment and the recognition accorded it which should be determinative in deciding whether it could have been meaningfully asserted.

Pointer v. Texas does not begin to encompass as contended by petitioner, that the accused has the absolute right to confront an informer who did not testify at his trial, but who only participated in the unlawful transaction charged. This is not the law in any jurisdiction—nor for that matter should it be.

The pivotal question at this stage should be what the law was at the time he could have presented the issue. Petitioner cannot sidestep state procedural rules by now raising the issue on the basis of what he feels the law should be.

Thus, what he is seeking here, is for this Court to approve, as excusable, his clear failure to properly raise and present this issue on appeal below, so long as the issue can now be somehow imaginatively theorized to allegedly fall within the purview of a case occurring in the context that *Pointer v. Texas* did here.

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[48]Brief for the Petitioner 48.

Such a rule would reduce to a shambles any appellate court's present standards for review and would also encourage the most flagrant abuse of what standards did remain.

It is submitted, that had petitioner properly presented this issue to the courts below, there can be little doubt but that their decision would have fully satisfied the present standards of this Court.

Respondent therefore respectfully requests that this Court abstain from passing on the issue at this time. Such abstinence, until a time when the state court has had a fair opportunity to squarely meet the issue, will only make more respected whatever view this Court may have on the problem.

B. Petitioner Was Not Denied the Right of Confrontation Guaranteed Him by the Sixth Amendment.

The confrontation clause of the Sixth Amendment provides that, "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." In the recent case of *Pointer v. Texas,* 380 U.S. 400 (1965), this Court interpreted that clause to mean that the prosecution may not introduce against the accused the preliminary hearing testimony of the victim (who was unavailable at trial) where the accused did not have a meaningful opportunity to cross-examine him. This Court then went on to hold that the Sixth Amendment right of confrontation was binding upon the states through the due process clause of the Fourteenth Amendment.

Petitioner has strained to construct his argument in such a fashion as to fall within the proscription of the above decision. Accordingly, he argues that the informant Green was a key witness against him because when the prosecution witnesses (the officers who observed the illegal sale by petitioner to Green) related Green's role in the unlawful transaction, they were reciting inadmissible hearsay assertions by Green. Thus the failure of the prosecution to call Green, as their own witness, denied him his Sixth Amendment right to confront the witnesses against him.

1. There Was No Hearsay Evidence of Any Consequence Used Against Petitioner.

Petitioner first alleges that he was denied his constitutional right of confrontation with respect to testimony of Agent Lee. Agent Lee testified on direct examination that it was he who transported the informant Green and Agent Armenta to the area of Newell's Market, there let them out, and shortly thereafter picked them back up (R. 156). He was then asked:

"Q. Did you observe any other persons at this time?

A. At that particular time? No, sir.

Q. And then following that, tell us what happened next?

A. *At that time I asked Mr. Green if he had the stuff, at which time he said yes and he handed me a brown paper packet.*

Q. And I will show you, for the record, People's Number 4, and ask you, sir, if you can

identify any of those objects for his Honor, the Court.

A. Yes, sir, I can." (R. 157) (Emphasis added).

Petitioner characterizes the italicized statement as prejudicial hearsay because it was an assertion by Green "that the man he perceived in the car was defendant."[43a]

Respondent submits that such an assertion was definitely not manifested in the above statement and that it is incorrect and grossly unreasonable to contend that it was. The only reasonable interpretation of the statement is that Green was merely asserting that he then actually had the narcotics—nothing more.

Exactly how this statement was "crucial" to the prosecution's case,[43b] respondent fails to understand—it appears de minimus at best. There was no dispute that Green did have the "stuff", or, going one step further, whether the "stuff" was actually heroin. Furthermore, while the testimony of Agent Lee, during which he volunteered Green's statement, may have technically been hearsay, any question of its admissibility was clearly waived by petitioner's failure to interpose an objection thereto.[44]

[43a] Brief for the Petitioner 44.

[43b] Brief for the Petitioner 42.

[44] "'If evidence of this kind [hearsay] is admitted without objection, it is to be considered, and accorded its natural probative effect, as if it were in law admissible.' *Spiller v. Atchison, T. & S. F. Ry. Co.*, 253 U.S. 117, 130 [citation omitted]; *Diaz v. United States*, 223 U.S. 442, 450 [citation omitted]; *Schlemmer v. Buffalo, Rochester & P. Ry. Co.*, 205 U.S. 189 [citation omitted]; *Dowling v. Jones*, 2 Cir., 67 F.2d 537, 539. The federal authorities are

Petitioner also errs when he characterizes Green's conduct in the transaction, as reflected in the observing officer's testimony, as hearsay evidence because it allegedly consisted of implied assertions by Green that petitioner had sold him the narcotics, and from which the trial court drew the inference that he (Green) truly believed "that the man he perceived in the car was petitioner." This position is untenable in both logic and fact.

Green's role in the transaction was not shown for the purpose of causing the trier of fact to draw inferences as to what Green did or did not believe—what he believed was immaterial.[45] The facts which established the prosecution's case were not hearsay assertions by Green,—but rather the circumstances surrounding the transaction from which Green returned with narcotics and without the marked money.

The relevant circumstances were as follows: Green was twice thoroughly searched before leaving the police station. He was then supplied with marked money. Thereafter, he was driven to a public telephone where he called petitioner and arranged for an immediate appointment at Newell's Market, where the proposed sale of narcotics would then be consummated. He was then driven to Newell's Market and let out of the car. From the moment he left the

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unanimous on this point." *United States v. Rosenberg*, 195 F.2d 583, 596 (2d Cir.), *cert. denied*, 344 U.S. 838 (1952). See also *People v. Huber*, 225 Cal.App.2d 536, 544, 37 Cal. Rptr. 512, 517 (1964), *cert. denied*, 380 U.S. 981 (1965); *People v. Caruth*, 237 Cal.App.2d 401, 404, 47 Cal. Rptr. 29, 31 (1964).

[45]See McCormick, Evidence, § 229 (1954), and II Wigmore, Evidence, § 267 (3d ed. 1940).

car until he returned five minutes later he was under continuous observation. While at Newell's Market he contacted no one other than petitioner. Upon his return to the car, he immediately handed over to Agent Lee the bindle of heroin.

It was this evidence establishing that Green could have received the heroin from no other source than petitioner that situated Green as merely an indirect reflection of petitioner—in effect, only a conduit. Plainly the officers simply could not have meaningfully described the operative facts without necessarily relating the role of Green therein.[46]

Furthermore, in response to defense counsel's motion for a dismissal on the basis of insufficient evidence (R. 206-207), the trial judge's statement clearly demonstrates that he was relying not on what Green said or believed, but rather on the observing officers' testimony which related a chain of circumstantial evidence so tightly connected it made inescapable the conclusion that petitioner had made the unlawful sale.

"Actually, I see no reason, Mr. Moran, to disbelieve at this point the basic testimony of the

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[46]Law enforcement stratagems of this type are routine in the investigation and detection of narcotics law violations. See, *e.g.*, *Jackson v. United States*, 330 F.2d 679 (8th Cir.), *cert. denied*, 379 U.S. 855 (1964); *Byrth v. United States*, 327 F.2d 917 (8th Cir.), *cert. denied*, 377 U.S. 931 (1964).

Note also that given this factual context, the problem is usually only one of sufficiency, *i.e.*, establishing conclusively that the decoy was continually under observation in order to negate any possibility he may have received the contraband from someone other than the accused. See *e.g.*, *People v. Wilkins*, 178 Cal.App. 2d 242, 2 Cal. Rptr. 908 (1960); *People v. Givens*, 191 Cal.App.2d 834, 838, 13 Cal. Rptr. 157 (1961), *cert. denied*, 368 U.S. 970 (1962); *People v. Basler*, 217 Cal.App.2d 389, 394-397, 31 Cal. Rptr. 884 (1963).

> officers. I have no doubt that the defendant was out there. I have no doubt that Green was out there. I have no doubt that contact was made. The two bindles are here. Agent Lee says they were turned over to him by Mr. Green after the contact." R. 208.

Thus Green was nothing more than a vehicle utilized by the officers to reflect the unlawful activities of petitioner.

2. The Prosecution Was Under No Obligation to Call the Informant Green as Its Own Witness.

In the instant case, the identity of the informant was known to petitioner and he was readily available as a witness should petitioner have desired him as such. *Cf., Roviaro v. United States,* 353 U.S. 53 (1957). Indeed, counsel for petitioner expressly stated, following completion of the prosecution's case, that he had been given the opportunity to talk to Green.

> "Mr. Moran: Now if the Court please, and I have discussed this with Mr. Curtin [prosecutor], this Mr. Green will be available—he's being made available at my request for tomorrow morning. I would wonder if it would be inconvenient to take a recess until that time." R. 208.

Plainly, there was no refusal to identify, no suppression of evidence, or any other form of misconduct by the prosecution with respect to the informant Green.

Thus, without unnecessary elaboration, the factual context of this issue is simply that the prosecution elected to present certain witnesses, but not others

and among whom was the informant Green. Given just such a context, generally speaking, it is the uniformly followed rule that the prosecution has a free election in deciding whether or not to call the informant.[47] "Appellant must plead and prove his own case and is responsible for the production in court of witnesses necessary to do so."[48]

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[47]See generally *Cenedella v. United States*, 224 F.2d 778, 783 (1st Cir.), *cert. denied*, 350 U.S. 901, (1955); *Warring v. United States*, 222 F.2d 906, 912 (4th Cir.), *cert. denied*, 350 U.S. 861 (1955); *United States v. Kabot*, 295 F.2d 848, 851 (2nd Cir. 1961), *cert. denied*, 369 U.S. 803 (1962); *Cohen v. United States*, 363 F.2d 321, 328 (5th Cir. 1966).

Re failure to call an informer: see *Eberhart v. United States*, 262 F.2d 421 (9th Cir. 1958); *Washington v. United States*, 258 F.2d 696 (D.C. Cir. 1958); *Williams v. United States*, 273 F.2d 781, 796 (9th Cir. 1958), *cert. denied*, 362 U.S. 951 (1960); *United States v. D'Angiolillo*, 340 F.2d 453, 455-456 (2nd Cir. 1965), *cert. denied*, 380 U.S. 955; *United States v. Repetti*, 364 F.2d 54, 55-56 (2nd Cir. 1966); *United States v. Holiday*, 319 F.2d 775, 776 (2nd Cir. 1963); *Diggs v. United States*, 352 F.2d 327 (5th Cir. 1965); *Miller v. Sigler*, 353 F.2d 424, 427-428 (8th Cir. 1965), *cert. denied*, 384 U.S. 980 (1966); *White v. United States*, 330 F.2d 811, 813-814 (8th Cir.), *cert. denied*, 379 U.S. 855 (1964); *United States v. White*, 344 F.2d 92, 93 (4th Cir. 1965); *Trent v. United States*, 284 F.2d 286 (D.C. Cir. 1960), *cert. denied*, 365 U.S. 889 (1961); *Richards v. United States*, 275 F.2d 655 (D.C. Cir.), *cert. denied*, 363 U.S. 815 (1960); *Washington v. United States*, 275 F.2d 687, 690 (5th Cir. 1960).

In California, see *People v. Wilkins*, 178 Cal.App.2d 242, 2 Cal. Rptr. 908 (1960); *People v. McShann*, 177 Cal.App.2d 195, 2 Cal. Rptr. 71 (1960); *People v. McCraskey*, 149 Cal.App.2d 630, 635, 309 P.2d 115, 118 (1957); *People v. Kiihoa*, 58 Cal.2d 748, 752, 349 P.2d 673, 675 (1960); *People v. Tuthill*, 31 Cal.2d 92, 187 P.2d 16 (1947), *cert. denied*, 335 U.S. 846 (1948); *People v. Castedy*, 194 Cal.App.2d 763, 15 Cal. Rptr. 413 (1961), *cert. denied*, 369 U.S. 825 (1962); *People v. Fontaine*, 237 Cal.App.2d 320, 46 Cal. Rptr. 855 (1965); *People v. Taylor*, 159 Cal.App.2d 752, 324 P.2d 715 (1958).

[48]*Thomas v. United States*, 158 F.2d 97, 99 (D.C. Cir. 1946), *cert. denied*, 331 U.S. 822 (1947); quoted with approval in *Ferrari v. United States*, 244 F.2d 132, 142 (9th Cir.), *cert. denied*, 356 U.S. 873 (1957).

The authority relied upon by petitioner (*United States v. Clarke*, 220 F.Supp. 905 (E.D. Pa. 1963); *United States v. Ramsey*, 220 F.Supp. 86 (E.D. Tenn. 1963); and the concurring opinion of Mr. Chief Justice Warren in *Lopez v. United States*, 373 U.S. 427, 444-45 (1963) is patently inapplicable to the instant case.

These decisions represent distinctly federal law in which the respective court's concern was over the administration of criminal justice in the federal courts[49]—and moreover, there is not the slightest mention in any of these decisions of a possible confrontation clause violation. The courts which have passed on a confrontation issue in this context have held there is no violation of that clause under these circumstances.[50]

Furthermore, in the cases cited by petitioner it is clear if not explicit that the determinative factor therein was that the accused's sole defense was one of entrapment and that it simply could not have been

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[49] "Although the dissent assumes that this case and *On Lee* are in all respects the same, to me they are quite dissimilar constitutionally and from the viewpoint of what this Court should permit *under its supervisory power over the administration of criminal justice in the federal courts.*" 373 U.S. 427, 441 (concurring opinion of Warran, C.J.). (Emphasis added). *Accord*, *United States v. Ramsey*, 220 F.Supp. at 86-88: "The issue with which the Court is confronted is whether federal trial courts possess the power to supervise federal law enforcement to the extent of requiring fair conduct from federal agents in furnishing evidence of crime. . . ."

[50] *Washington v. United States*, 275 F.2d 687, 690 (5th Cir. 1960); *Dear Check Quong v. United States*, 160 F.2d 251, 253 (D.C. Cir. 1947); and *Curtis v. Rives*, 123 F.2d 936 (D.C. Cir. 1941).

put forth without recourse to the absent witness.[50a] Indeed, petitioner now urges that he was prejudiced by Green's absence because cross-examination of Green would have permitted him the opportunity of establishing just such a defense.

Neither at trial nor in the District Court of Appeal did petitioner so much as hint at the possibility of an entrapment. His defense was solely one of mistaken identity. He flatly denied any knowledge of or relationship to the unlawful activities which took place at Newell's Market on December 21, 1961.

The established rule under both California and federal law is that the defense of entrapment must affirmatively be put in issue at the trial level before it can be raised on appeal.[51] In the instant case, it was not even presented on appeal and respondent accordingly contends that the conclusion of waiver is inescapable.

[50a] *United States v. Clarke* and *United States v. Ramsey, supra.*

[51] *People v. Tostado*, 217 Cal.App.2d 713, 719, 32 Cal. Rptr. 178, 182 (1963); *People v. Hawkins*, 210 Cal.App.2d 669, 671-72, 27 Cal. Rptr. 144, 146 (1962); *People v. Branch*, 119 Cal.App.2d 490, 495, 260 P.2d 27, 30 (1953); *People v. Cline*, 205 Cal.App.2d 309, 312, 22 Cal. Rptr. 916, 917 (1962); *People v. Valdez*, 188 Cal.App.2d 750, 10 Cal. Rptr. 664 (1961).

Grant v. United States, 291 F.2d 746, 748 (9th Cir. 1961), *cert. denied*, 368 U.S. 999 (1962); *Craig v. United States*, 337 F.2d 28, 29 (8th Cir. 1964), *cert. denied*, 380 U.S. 909 (1965); *United States v. Countryman*, 311 F.2d 189, 191 (2nd Cir. 1962); *Lucas v. United States*, 343 F.2d 1, 4 (8th Cir.), *cert. denied*, 382 U.S. 862 (1965); *Ramirez v. United States*, 294 F.2d 277 (9th Cir. 1961).

CONCLUSION

For the foregoing reasons, respondent respectfully urges that the judgment of conviction and sentence in petitioner's case be affirmed.

Dated, San Francisco, California,
November 18, 1966.

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Of Counsel.

(Appendix Follows)

Appendix

UNITED STATES CONSTITUTION

Fourth Amendment

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Sixth Amendment

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of

the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Fourteenth Amendment

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

UNITED STATES CODE

Title 28

28 U.S.C. §1257 (1964), 62 Stat. 929 (1949)

§1257. State courts; appeal; certiorari

Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or

laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States,

28 U.S.C. §2111 (1964), 63 Stat. 105 (1949)

On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties.

Title 49

§782. Any vessel, vehicle, or aircraft which has been or is being used in violation of any provision of section 781 of this title, or in, upon, or by means of which any violation of said section has taken or is taking place, shall be seized and forfeited: *Provided*, That no vessel, vehicle, or aircraft used by any person as a common carrier in the transaction of business as such common carrier shall be forfeited under the provisions of this chapter unless it shall appear that (1) in the case of a railway car or engine, the owner, or (2) in the case of any other such vessel, vehicle, or